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No. 07-980

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In The
Supreme Court of the United States

MICHAEL FOGARTY AND TERRIE FRITZ,

Petitioners,

v.

ALFRED MILTON EVANS; SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC.; RUSTLING WINDS, INC.; MORNING STAR MENTAL HEALTH SERVICES, INC.; DIVERSIFIED FAMILY SERVICES, INC.; SERENITY SPRINGS MENTAL HEALTH SERVICES, L.L.C.; JCH, INC.; NEAL THRIFT; NANCY GRAVES-THRIFT; JOHN MAJORS; CYNTHIA MAJORS; CHARLES PARKHURST; MARY PARKHURST; LEROY WHEELER; AND JOEL HOLCOMB,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents Alfred Milton Evans, Neal Thrift, Nancy Graves-Thrift, John Majors, Cynthia Majors, Charles Parkhurst, Mary Parkhurst, Leroy Wheeler, and Joel Holcomb state that they are not stock-issuing corporations and that they have no parent corporations or other corporate stockholders.

Respondents Southeastern Oklahoma Family Services, Inc.; Rustling Winds, Inc.; Morning Star Mental Health Services, Inc.; Diversified Family Services, Inc.; and JCH, Inc. are Oklahoma corporations. The parent company of Rustling Winds, Inc. is Timber Winds, Inc. No publicly-held corporation owns any of Rustling Winds, Inc.'s stock. Diversified Family Services, Inc.; JCH, Inc.; Morning Star Mental Health Services, Inc.; and Southeastern Oklahoma Family Services, Inc. do not have parent corporations, and no publicly-held corporation owns ten percent (10%) or more of their stock. Serenity Springs Mental Health Services, L.L.C. is an Oklahoma limited liability company and not a stock-issuing corporation.

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STATEMENT OF THE CASE

Respondents adopt the facts as set forth in the Tenth Circuit's Order and Judgment filed August 22, 2007, Pet'r App. pp. 1a-53a, and as set forth in the Tenth Circuit's Order and Judgment filed January 26, 2005. *See infra* App. 78-81.

With regard to Petitioners' Statement of the Case, Respondents object to any and all facts suggesting that Petitioners' conduct toward Respondents was based on a budgetary, as opposed to a retaliatory, motive. Petitioners' facts are slanted in their own favor and are premised primarily on the District Court's grant of Petitioners' motion for judgment as a matter of law after the second jury trial. Petitioners do not discuss, in detail, the findings of either jury or the findings of the Tenth Circuit.

Additionally, Petitioners do not make this Court aware of OKLA. STAT. ANN. tit. 51, § 162(A)(2), which impacts Petitioners' personal liability for the compensatory damages awarded. That statute states, in pertinent part:

> A. The state or any political subdivision, subject to procedural requirements imposed by this section, other applicable statute, ordinance, resolution, or written policy, shall:
>
> 2. Pay or cause to be paid any judgment entered in the courts of the United States, the State of Oklahoma or any

> other state against any employee or political subdivision. . . .

REASONS FOR DENYING THE WRIT

Petitioners are high-ranking state officials who abused their positions and implemented a regime of lawless conduct by retaliating against Respondents for speaking publicly about the State of Oklahoma's Medicaid system. Respondents' only means of vindicating their First Amendment right to free speech are damages. The Tenth Circuit's opinion does not, as Petitioners contend, unfairly impose liability on state officials who were simply doing their job but, rather, holds high-ranking state officials accountable for their intentional abuse of power and deprivation of Respondents' First Amendment right to free speech.

The Tenth Circuit's finding that Petitioners had waived their qualified immunity defense does not conflict with the decisions of other circuit courts and is not in tension with the principles of qualified immunity established by this Court.

The standard of review applied by the Tenth Circuit to the District Court's grant of a new trial is not contrary to this Court's decisions and does not exacerbate an existing conflict among the courts of appeals.

And finally, the Tenth Circuit's reinstatement of the punitive damages awards against Petitioners

after the first trial does not merit review, as a reasonable relationship exists between the amount of punitive damages that were awarded after the first trial and the probable amount of compensatory damages that will be awarded after remittitur.

I. This Court Should Deny The Petition For A Writ Of Certiorari As To The Qualified Immunity Issue Because The Issue Is Moot, The Tenth Circuit's Finding Of Waiver Does Not Conflict With The Decisions Of Other Circuits, And Petitioners Are Not Entitled To The Protection Afforded By Qualified Immunity.

A. Whether Petitioners Should Have Been Allowed To Assert Qualified Immunity At The Second Trial Is Moot, Because The District Court Abused Its Discretion In Granting A Second Trial.

In their Petition for a Writ of Certiorari, Petitioners try to blur the true issue on appeal to this Court with regard to qualified immunity. Petitioners did not argue to the Tenth Circuit that the District Court had erred in prohibiting them from asserting qualified immunity at the *first* trial, as Petitioners had not even attempted to assert the defense at the pre-trial/post-discovery phase, at the trial phase, or at the post-trial phase of the *first* trial. Nor did Petitioners argue to the Tenth Circuit that the District Court had erred in denying their motion to dismiss, in which they had asserted qualified immunity at the

pleading phase of the *first* trial. The actual issue that Petitioners presented to the Tenth Circuit was whether the District Court had erred in not allowing them to rely on the defense subsequent to the first trial but prior to the second trial. The Tenth Circuit abstained from answering that question, however, because it found that the District Court had abused its discretion in granting a second trial at all, thus rendering moot the question of whether the District Court had erred in denying Petitioners use of the defense in advance of the second trial.

As explained more fully in Subsection (II) below, the Tenth Circuit correctly held that the District Court had abused its discretion in granting a second trial. For that reason, this Court need not now address whether the District Court should have allowed Petitioners to assert qualified immunity in advance of the second trial, as the issue continues to be moot. Because the Tenth Circuit reinstated the first jury verdict, the real issue before this Court is whether the Tenth Circuit erred in finding that Petitioners had waived their qualified immunity defense for purposes of the *first* trial.

The Tenth Circuit did not err in finding that Petitioners had waived their qualified immunity defense for purposes of the first trial. And, even if the Tenth Circuit improperly overturned the District Court's grant of a new trial, the District Court did not abuse its discretion in prohibiting Petitioners from asserting qualified immunity in advance of the *second* trial, because Petitioners' failure to press qualified

immunity at the first trial effectuated waiver for purposes of the second trial, as well.

B. The Tenth Circuit Correctly Found That Petitioners Had Waived Their Qualified Immunity Defense For Purposes Of The First Trial, And The Tenth Circuit's Finding Of Waiver Does Not Conflict With The Decisions Of Other Circuit Courts.

By presenting a distorted version of the Tenth Circuit's finding and by providing incomplete accounts of other circuit courts' opinions, Petitioners give the appearance that a circuit split exists with regard to waiver of qualified immunity, hoping that this Court will grant a writ of certiorari to resolve the supposed conflict among the circuit courts. In actuality, however, the issue on which the circuit courts are supposedly split was not the basis of the Tenth Circuit's finding of waiver.

Specifically, Petitioners argue that the Tenth Circuit departed from the decisions of other circuit courts when it found that Petitioners had waived their qualified immunity defense for failure to include it in the pretrial order. But, the Tenth Circuit did not find that Petitioners had waived their qualified immunity defense solely because they had failed to include it in the pretrial order. Rather, the Tenth Circuit found that Petitioners had waived the defense because they had neglected to press it at every opportunity. They had "failed to assert qualified immunity

in their motions for summary judgment, the pretrial order, or in their oral motions for [judgment as a matter of law] at the close of the plaintiffs' case." Pet'r App. pp. 16a-17a n.9. Therefore, any authority cited by Petitioners as standing for the proposition that qualified immunity is not waived if not included in the pre-trial order (*i.e.*, *Calderon v. Witvoet*, 999 F.2d 1101 (7th Cir. 1993); *Nagy v. Riblet Prod. Corp.*, 79 F.3d 572 (7th Cir. 1996)), is wholly irrelevant in determining whether the Tenth Circuit erred in finding that Petitioners had waived their qualified immunity defense. Moreover, even if the Tenth Circuit's finding had been premised solely on Petitioners' failure to include the defense in the pre-trial order, *Calderon* and *Nagy* would lend no support to Petitioners' position, as those cases held that an affirmative defense must generally be included in the pretrial order to be preserved but that an exception exists when the district court has foreclosed the defense from trial. As explained more fully below, the District Court did not foreclose Petitioners' qualified immunity defense from the first trial.

At first blush, it appears that Petitioners are arguing that failure to include qualified immunity in the pretrial order should not result in waiver; however, a closer look reveals that Petitioners are, in fact, arguing that qualified immunity lives forever and that it may be pressed for the first time seven (7) months *after* the conclusion of a jury trial. Petitioners' position, however, is simply untenable, as even the First and Fifth Circuits, which Petitioners cite as

allowing the defense to be raised at *any* time, hold that, at some point, qualified immunity must be cut off.

This Court has stated that qualified immunity is an affirmative defense that must be raised by the defendant. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). As an affirmative defense, qualified immunity may be waived if not properly raised. *See Farquhar v. Jones*, 141 Fed. Appx. 539, 540 (9th Cir. 2005) (not published in the Federal Reporter) (***holding that qualified immunity had been waived when raised for the first time in an objection to the magistrate judge's report***); *Stephenson v. Doe*, 332 F.3d 68, 76 (2d Cir. 2003) (explaining that qualified immunity can be waived by failure to raise it in a timely fashion or by failure to raise it with sufficient particularity); *Eddy v. Virgin Islands Water & Power Auth.*, 256 F.3d 204, 209-10 (3d Cir. 2001) (***stating that a district court has discretion to determine whether the defendant diligently raised qualified immunity***); *Skrtich v. Thornton*, 280 F.3d 1295, 1306-07 (11th Cir. 2002) ("Qualified immunity is an affirmative defense to personal liability, which must be pled, and if it is not, it is deemed waived."); *Sales v. Grant*, 224 F.3d 293, 294-96 (4th Cir. 2000) (***holding that the defendants, who had only cursorily referenced qualified immunity in their answer, could not pursue the defense for the first time on remand for a new trial***); *English v. Dyke*, 23 F.3d 1086, 1090 (6th Cir. 1994) (***"[T]he trial court has***

discretion to find a waiver if a defendant fails to assert the defense within time limits set by the court or if the court otherwise finds that a defendant has failed to exercise due diligence or has asserted the defense for dilatory purposes.") (citation omitted); *Maul v. Constan*, 928 F.2d 784, 785-86 (7th Cir. 1991) (***holding that the defendants, who had asserted "good faith immunity" in their answer, had not sufficiently preserved the defense and could not urge it for the first time in a post-trial motion***); *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 601 (5th Cir. 1988) (***declining to review whether appellants were entitled to qualified immunity, because they had not "squarely posed" the issue until filing a motion for new trial***).

The point at which qualified immunity is deemed waived may vary, depending on the deciding court and the circumstances of the case. But, the fact that qualified immunity may be waived is undisputed, and as noted in the above parentheticals, district courts have discretion in deeming the defense waived.

Respondents recognize that qualified immunity may be asserted at various stages of litigation and that failure to assert the defense at one stage does not necessarily preclude the defendant from asserting the defense at a later stage. However, a defendant may not casually assert the defense at the beginning of a lawsuit and then rely on that one assertion for the duration of the case, which is exactly what Petitioners are urging.

Petitioners asserted qualified immunity prior to the first trial in a motion to dismiss, which the District Court denied, and then again in their answers. *See infra* App. 15-23, 48, 97; Pet'r App. pp. 115a-18a. Thereafter, Petitioners failed to press the defense. They did not assert it in their motions for summary judgment. They did not include it in the pre-trial order. They did not submit it with their proposed jury instructions. And, they did not raise it in their motions for judgment as a matter of law at trial. *See infra* App. 77-81. In fact, Petitioners did not forcefully press the defense again until seven (7) months *after* the first trial, when they retained new counsel to represent them at the second trial and requested leave of court to file a motion for summary judgment on the ground of qualified immunity, which request the District Court denied. *See infra* App. 82, 84-88.

Petitioners now argue that they did not need to press their qualified immunity defense subsequent to the District Court's denial of their motion to dismiss, claiming that the denial was a final resolution of Petitioners' entitlement to the defense for the entire duration of the litigation. Petitioners, however, may not use the District Court's denial of their motion to dismiss at the pleading stage of the first trial as an excuse for their failure to reassert the defense at later stages of the litigation.

Whether a defendant is entitled to qualified immunity is analyzed differently at the summary-judgment phase than it is at the motion-to-dismiss phase. "At that earlier stage, it is the defendant's

conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.' On summary judgment, however, the plaintiff can no longer rest on the pleadings, . . . and the court looks to the evidence before it (in the light most favorable to the plaintiff). . . ." *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996).

Simply because the District Court found that Petitioners could not be dismissed from suit at the pleading stage of the first trial, because Respondents had sufficiently alleged a violation of a clearly established constitutional right in their complaint, was no guarantee that the District Court would find that the evidence produced during discovery was sufficient to support the violation alleged in Respondents' complaint. Therefore, if Petitioners had thought that the evidence produced during discovery did not support the violation alleged in Respondents' complaint, then Petitioners could, and should, have asserted qualified immunity in a motion for summary judgment at the pre-trial/post-discovery phase of the first trial. *See id.* ("It is no more true that the defendant who has unsuccessfully appealed denial of a motion to dismiss has no need to appeal denial of a motion for summary judgment, than it is that the defendant who has unsuccessfully *made* a motion to dismiss has no need to *make* a motion for summary judgment."). Because Petitioners did not assert qualified immunity in their motions for summary judgment, they did not even give the District Court the opportunity to evaluate whether they were immune from facing the burden of

trial. Moreover, because they did not bother to press the defense at trial, they did not give the District Court the opportunity to evaluate whether they were immune from liability.

Petitioners cite *Guzmán-Rivera v. Rivera-Cruz*, 98 F.3d 664 (1st Cir. 1996) to support their position that the Tenth Circuit erred in finding waiver. *Guzmán-Rivera*, however, actually provided the basis of the Tenth Circuit's finding. Pet'r App. p. 17a n.9.

The defendants in *Guzmán-Rivera* asserted qualified immunity on the eve of trial. Although the First Circuit held that the defendants had not waived the defense for trial, it did hold that they had waived it for the pre-trial/post-discovery phase, meaning the defendants were not immune from suit, even if they might later be found immune from liability.

The First Circuit expressed concern in *Guzmán-Rivera* with regard to a defendant's intentional delay in asserting qualified immunity for the purpose of prejudicing the plaintiff. To help reduce such tactical delay, the First Circuit encouraged district courts to enter scheduling orders, stating:

> Delay generated by claims of qualified immunity may work to the disadvantage of the plaintiff. Witnesses may become unavailable, memories may fade, attorneys fees accumulate, and deserving plaintiffs' recovery is delayed. *See Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) ("Defendants may seek to stall because they gain from delay at

> plaintiffs' expense, an incentive yielding unjustified appeals."). Delay is also costly to the court system, demanding more time and energy from the court and retarding the disposition of cases. . . .
>
> In order to reduce the potential for abuse by defendants, we believe that the defense of qualified immunity may be deemed to have been waived if it is not raised in a diligent manner during the post-discovery, pre-trial phase. To find otherwise is to invite strategic use of the defense by defendants who stand to benefit from delay. . . .
>
> [D]istrict courts are encouraged to enter scheduling orders to prevent dilatory tactics on the part of defendants with qualified immunity defenses. Absent an abuse of discretion, this court will enforce those scheduling deadlines by affirming a finding of waiver and awarding double costs.

Id. at 667-69.

Petitioners are not similar to the defendants in *Guzmán-Rivera*, because not only did Petitioners fail to diligently press qualified immunity at the pre-trial/post-discovery phase of the first trial, they also failed to diligently press qualified immunity at the trial itself and at the post-trial phase of the first trial. Moreover, Petitioners did not appeal the District Court's denial of their motion to dismiss premised on qualified immunity. *See infra* App. 78. The first time that Petitioners diligently reasserted their qualified immunity defense was approximately seven

(7) months *after* the first trial, when they filed a motion seeking leave of court to file a motion for summary judgment based on qualified immunity. *See infra* App. 84-88. Petitioners' failure to press the defense prior thereto is the very type of prejudicial delay about which the First Circuit expressed concern in *Guzmán-Rivera*. And, even if the purpose of Petitioners' delay was not to intentionally prejudice Respondents, prejudice would have resulted had the Tenth Circuit allowed Petitioners to escape liability for their misdeeds after a jury verdict. Petitioners' delay in asserting the defense appears to be one last-ditch attempt to escape liability after gambling and losing on the jury's verdict. As explained by the Tenth Circuit in its opinion, however, qualified immunity "is not a parachute to be deployed only when the plane has run out of fuel." Pet'r App. p. 17a n.9.

Petitioners also cite to *O'Connor v. Huard*, 117 F.3d 12 (1st Cir. 1997) to support their contention that the Tenth Circuit erred in not considering the substantive elements of their qualified immunity defense on appeal. Like *Guzmán-Rivera*, however, *O'Connor* is distinguishable.

In *O'Connor*, also a First Circuit case, the defendant waited to assert qualified immunity until filing a motion notwithstanding the verdict. On appeal, the First Circuit reviewed the district court's denial of the defendant's motion. But, the First Circuit reviewed the denial for plain error only, because it found that the defendant had *not* properly preserved the defense

by raising it for the first time after the verdict. *Id.* at 17.

The case *Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993), also cited by Petitioners, is somewhat similar to the instant case in that the Fifth Circuit had to decide whether to review the district court's denial of the defendant's motion for summary judgment based on qualified immunity, which had not been filed until *after* a new trial had been granted. The Fifth Circuit ultimately decided to review the denial. But, it noted that it was not deciding whether a defendant who has not presented qualified immunity at the first trial may present it at the second trial, because the Fifth Circuit found that the defendant *had* sufficiently presented qualified immunity at the first trial. Although the defendant had not moved to dismiss on the ground of qualified immunity in advance of the first trial and had not specifically included qualified immunity in the pre-trial order, he had (1) incorporated into the pre-trial order all of the defenses asserted in his answer to the complaint, which included qualified immunity; (2) argued immunity at the close of plaintiff's case and at the close of evidence; and (3) included in the jury instructions elements for immunity.

Unlike the defendant in *Spann*, Petitioners did not assert qualified immunity at the first trial. Rather, they reasserted it seven (7) months *after* the first trial. Thus, the Fifth Circuit's decision to review the district court's denial of the defendant's motion for summary judgment in *Spann* lends no support to

Petitioners' contention that the Tenth Circuit erred in not considering the substantive elements of their qualified immunity defense, as the defendant in *Spann* had sufficiently preserved his qualified immunity defense for appeal by asserting it at the first trial.

Petitioners also cite *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1320 & n.10 (11th Cir. 2000) and *Kelly v. City of Oakland*, 198 F.3d 779, 784 (9th Cir. 1999) to support their contention that qualified immunity may be reviewed on appeal even if it was not raised at trial. Once again, however, Petitioners mischaracterize the facts of the authority they cite.

Like the defendant in *Spann*, the defendant in *Alexander* raised qualified immunity at trial, as she raised it at the close of the plaintiff's case. And in *Kelly*, the defendants asked for a jury instruction containing elements of qualified immunity and then raised qualified immunity again by motion after the verdict, which the district court denied on the ground that the defendant had not asserted qualified immunity in a motion prior to jury deliberation. Like the First Circuit in *O'Connor*, 117 F.3d at 17, the Ninth Circuit in *Kelly* found that the defendant had waited too long to assert the defense. Although the Ninth Circuit reviewed the district court's denial, it did so only for plain error and only in the interest of justice, stating: "We have . . . occasionally reviewed for plain error even when no motion for judgment as a matter of law was made." The Ninth Circuit, in no way, stated that a denial of qualified immunity ***must*** be

reviewed on appeal if not properly preserved, however.

As stated hereinabove, the stage at which qualified immunity is deemed waived varies, depending on the court and the circumstances of the case. Some courts allow defendants to assert qualified immunity for the first time very late into the proceedings, while others deem the defense waived. The Tenth Circuit is actually quite lenient. If the defendant has properly raised qualified immunity in an answer, in a motion to dismiss, or in a motion for summary judgment but then does not reassert the defense until after trial, the Tenth Circuit will still review the district court's denial of the defense. *Marshall v. Columbia Lea Reg'l Hosp.*, 474 F.3d 733, 739 (10th Cir. 2007) ("[A] post-trial grant of immunity would still confer a benefit by shielding [defendants] from any liability for the monetary damages awarded by the jury.") (citing *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 562 n.6 (1st Cir. 2003)). It will just review the evidence in the light "most hospitable" to the party that prevailed at trial. *Id.* (citing *Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st Cir. 1999)).

The Tenth Circuit did not review the substantive elements of Petitioners' qualified immunity defense for purposes of the first trial, because although Petitioners had raised the defense in their motions to dismiss and in their answers, they had not reasserted it at the first trial or during the post-trial phase of the first trial. Reasserting it seven (7) months *after* the first trial is simply too late. Despite Petitioners'

wishes, qualified immunity does ***not*** live forever. Petitioners had numerous opportunities to assert the defense: (1) they could have asserted it prior to the first trial in a motion for summary judgment; (2) they could have included it in the pre-trial order; (3) they could have submitted it with their proposed jury instructions; (4) they could have asserted it at the first trial after the Respondents' case-in-chief; (5) they could have asserted it after presenting their own case at the first trial; and (6) they could have asserted it in a motion notwithstanding the verdict. Petitioners failed to take advantage of all of these opportunities. For that reason, the Tenth Circuit was not unreasonable in deeming the defense waived for purposes of the first trial, and the District Court did not abuse its discretion in deeming the defense waived for purposes of the second trial.

C. Even If The Tenth Circuit Erred In Concluding That Petitioners Had Waived Their Qualified Immunity Defense For Purposes Of The First Trial, The Error Was Harmless Because Petitioners Are Not Entitled To The Protection Afforded By Qualified Immunity.

Qualified immunity is just that – qualified. It does not protect from civil damages government officials performing discretionary functions whose conduct violates a clearly established statutory or constitutional right of which a reasonable person would have known. *Harlow*, 457 U.S. at 818.

There is no doubt that Respondents were engaged in protected First Amendment activity when they were speaking publicly about the State of Oklahoma's Medicaid system, and Petitioners did not dispute this fact on appeal to the Tenth Circuit. Pet'r App. p. 18a. The First Amendment right to free speech is a clearly established right. *Bennett v. Hendrix*, 423 F.3d 1247, 1255 (11th Cir. 2005); *McGreevy v. Stroup*, 413 F.3d 359, 366-67 (3d Cir. 2005); Pet'r App. pp. 115a-18a.

Respondents presented a lot of evidence at trial proving that Petitioners had retaliated against them for speaking publicly about Oklahoma's Medicaid System. For example, Respondent Cynthia Majors testified that Petitioner Fogarty had threatened that if her husband, Respondent John Majors, continued to lobby at the Capitol, "he could send someone down to investigate [her] nursing home for fraudulent billing." Pet'r App. p. 36a. And, even before the first trial, the District Court found that the evidence presented by Respondents demonstrated "an uncanny correlation" between Respondents' exercise of free speech rights and the administrative actions taken by the Oklahoma Health Care Authority. *See infra* App. 59-63. The District Court also found that Respondents were "likely to succeed in showing that the [Petitioners] took certain retaliatory actions in response to the exercise of First Amendment rights. . . ." *See infra* App. 63. Then, two different juries concluded that Petitioners had retaliated against Respondents for speaking publicly about the State of Oklahoma's Medicaid system and that Petitioners'

conduct had not been for a budgetary purpose. Even in the District Court's February 23, 2005 order after the second trial, the District Court denied Petitioner Fogarty's motion for judgment as a matter of law as to all individual Respondents, except for Mary Parkhurst and Joel Holcomb. And, if that is not enough to prove that Petitioners' violated Respondents' First Amendment right to free speech, the Tenth Circuit, after reviewing all of the evidence on appeal, stated:

> [W]e are satisfied that a reasonable juror could conclude that Fritz and Fogarty acted with "reckless or callous indifference," if not "evil motive or intent," to the rights of the [Respondents]. *Hardeman* [*v. City of Albuquerque*], 377 F.3d [1106,] 1121. Plaintiffs met with persistent hostility from Fritz and Fogarty, and were subject to a wide variety of injuries in relation for their political activities. A reasonable juror could conclude, based on the evidence before it, that Fogarty and Fritz wanted to silence members of the Association, were embarrassed by their lobbying efforts, and acted to starve them of Medicaid funding in an effort to put them out of business. This type of behavior is the sort that is properly answered by punitive damages, which act "to punish what has occurred and to deter its repetition." *Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1309 (10th Cir. 2003).

Based on the foregoing, Petitioners certainly violated a clearly established constitutional right of which any reasonable person would have known. No reasonable person in Petitioners' position would have

thought that it was legal to intentionally deny Medicaid reimbursement to deserving individuals simply because they had engaged in public speech regarding Oklahoma's Medicaid system. Qualified immunity does not protect government officials from civil damages for such malicious conduct. Therefore, whether the Tenth Circuit erred in finding waiver for purposes of the first trial or whether the District Court abused its discretion in finding waiver for purposes of the second trial is completely irrelevant, because Petitioners would not have been immune from liability in any event. As such, this Court should deny the Petition for a Writ of Certiorari as to the qualified immunity issue.

II. The Alleged Split Among The Circuit Courts With Regard To The Proper Standard Of Review Of A Trial Court's Grant Of A New Trial Is Merely One Of Semantics And Not Of Substance.

Petitioners quote the following statement from the United States Supreme Court case *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 435 (1996) as support for their contention that the Tenth Circuit reviewed the District Court's *grant* of a second trial too stringently: "[A]ppellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice." Petitioners have taken this statement from *Gasperini* out of context, however, as *Gasperini* concerned what standard of review, if any, a federal appellate court should apply to a district court's *denial* of a motion for a new trial premised on

excessive damages. Thus, Petitioners' argument that *Gasperini* lowered the standard of review for the *grant* of a new trial premised on *insufficient evidence* is without merit. Furthermore, while Petitioners primarily cite pre-*Gasperini* cases, in which a more exacting scrutiny was applied, to bolster their argument that a more exacting scrutiny is a thing of the past, the truth is that since *Gasperini*, the circuit courts have continued to subject the *grant* of a new trial to more exacting scrutiny, particularly when the grant was premised on the ground that the evidence did not support the jury's verdict.

The precise issue presented in *Gasperini* was whether federal appellate courts could apply a New York state law that gave them the power "to review the size of jury verdicts and to order new trials when the jury's award 'deviate[d] materially from what would [have] be[en] reasonable compensation.'" *Id.* at 418. Stated more simply, the issue was whether *appellate* judges, who were not present at the trial, possess the power to vacate a jury verdict on the ground of excessiveness and to order a new trial when the district judge, who *was* present at the trial, declined to do so. On appeal to the United States Supreme Court, this Court held that appellate judges do possess such power, but only if the district judge abused his discretion in denying a new trial.

The reason why the holding in *Gasperini* is significant is because, at one time, it was the law that the trial court's denial of a motion for a new trial, based on the ground that the verdict was against the weight of the evidence or that the verdict was

excessive or inadequate, was not reviewable at all, because such review was "deemed inconsonant with the Seventh Amendment's Reexamination Clause."[1] *Id.* at 434; 11 CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2818, p. 197, § 2819, p. 200 (2d ed. 1995). The holding in *Gasperini* finally put to rest all doubt that appellate judges, who were not present at the trial, have the power to set aside a jury verdict and to order a new trial, despite the trial judge's refusal to do so. *Id.* at § 2819, p. 204. Thus, this Court's statement that "appellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice" simply means that appellate judges do not violate the Reexamination Clause of the Seventh Amendment when they review a district court's *denial* of a new trial.

Despite Petitioners' assertion that *Gasperini* should have governed the Tenth Circuit's review of the District Court's *grant* of a new trial, "[d]ifferent considerations apply when the trial court has *denied* [a] motion [for a new trial] than when it has *granted* it and the problems must be considered separately." *Id.* at § 2819, p. 198-99 (emphasis added). *See also* Michelle

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[1] The Seventh Amendment of the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Migdal Gee, Annotation, *What Standards Govern Appellate Review of Trial Court's Conditional Ruling, Pursuant to Rule 50(c)(1) of Federal Rules of Civil Procedure on Party's Motion for New Trial,* 52 A.L.R. FED. 494 § 2 (originally published in 1981) ("It has been recognized that closer appellate scrutiny is required when a new trial has been granted . . . than when it has been denied . . . , since in the latter situation the trial judge has left standing the jury's determination and, therefore, has in no way abridged the parties' right to a jury trial."). "It has also generally been held that the degree of appellate scrutiny depends on the *reasons* for the ruling. . . . Where the stated reason for granting a new trial was the weight of the evidence . . . , the appellate courts . . . scrutinize[ ] the ruling more closely. . . ." *Id.* (emphasis added). The reason why appellate courts scrutinize the *grant* of a new trial that is premised on insufficient evidence more closely than they scrutinize the *denial* of a new trial is because:

> There is no Seventh Amendment problem . . . if the appellate court reverses the trial court's *grant* of a new trial [on the ground that the verdict was against the weight of the evidence]. In this instance the appellate court is not reexamining facts found by a jury but is reinstating the jury's findings as against the contrary findings of the judge. Appellate action in this context protects the role of the jury, as envisioned by the Seventh Amendment, rather than running contrary to it.

11 FEDERAL PRACTICE AND PROCEDURE § 2819, p. 205 (emphasis added).

By quoting more-stringent-scrutiny language from the opinions of certain circuit courts, Petitioners try to give the appearance that a split exists among the circuit courts with regard to the proper standard of review for the *grant* of a new trial. However, the circuit courts unanimously agree that the proper standard of review is abuse of discretion. Simply because some circuit courts examine the evidence more closely than others does not mean that those courts are not giving proper deference to the district court's decision or that a substantive circuit split exists. At best, the split among the circuit courts is one of semantics.

Petitioners cite no case law from the First Circuit, but as stated above, the articulated standard of review in the First Circuit for the grant of a new trial is abuse of discretion. *United States v. Rivera Rangel*, 396 F.3d 476, 485-86 (1st Cir. 2005). Although the First Circuit does not use the same terminology that the Tenth Circuit uses to define "abuse of discretion," the standard of review employed by the First Circuit appears to be very much like the one employed by the Tenth Circuit, because the First Circuit will find an abuse of discretion if there was merely "ample" evidence to support the jury's verdict and if the jury's verdict was not "seriously erroneous." *Id.* at 486 (stating that "[t]here are 'definite limits upon a

district court's right to upset a jury verdict' ") (citation omitted).

Like the First Circuit, the Second Circuit acknowledges "the need [for] particularly close appellate scrutiny where the trial judge grants a new trial solely because the judge regards the verdict as against the weight of the evidence." *See Crane v. Consol. Rail Corp.*, 731 F.2d 1042, 1048 (2d Cir. 1984). The Second Circuit even uses the same language that the First Circuit used in *Rivera Rangel* to describe the circumstances under which a trial judge has authority to grant a new trial. *See Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 261 (2d Cir. 2002) (stating that a district court may grant a new trial on the basis that the verdict was against the weight of the evidence only if the jury reached a "seriously erroneous" result or if allowing the verdict to stand would result in a miscarriage of justice) (citation omitted). *See also United States v. Robinson*, 430 F.3d 537, 543 (2d Cir. 2005) (stating that "the court may not wholly usurp the jury's role" and that the trial judge may intrude upon the jury function only where exceptional circumstances can be demonstrated) (citation omitted).

Like the First and Second Circuits, the articulated standard of review for the grant of a new trial in the Third Circuit is abuse of discretion. *Wilburn v. Maritrans GP Inc.*, 139 F.3d 350, 363 (3d Cir. 1998) (citation omitted). At the same time, however, the Third Circuit exercises a "closer degree of scrutiny" when the district court *grants* a motion for a new trial

on the ground that the verdict is against the weight of the evidence, because the Third Circuit is cognizant of the potential for a district court to substitute its judgment for that of the jury. *Id.* (citation omitted). *See also id.* at 364 ("[T]his court has held that 'new trials because the verdict is against the weight of the evidence are proper only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience.'") (citation omitted).

Similarly, the Fourth Circuit's articulated standard of review for the grant of a new trial is abuse of discretion. *Creech v. Nguyen*, 153 F.3d 719, 1998 WL 486354, at *8 (4th Cir. 1998) (unpublished opinion) (citation omitted). Yet, like the First, Second, and Third Circuits, the Fourth Circuit exercises a "closer degree of scrutiny and supervision" when reviewing the grant of a new trial on the ground that the verdict was against the weight of the evidence. *Id.* "A closer degree of scrutiny is warranted to protect the litigant's Seventh Amendment right to a jury trial." *Id.*

Petitioners list the Fifth Circuit as being one of five circuit courts to apply a lower standard of federal appellate review to the grant of a new trial. It is no surprise, then, that the Fifth Circuit's articulated standard of review is abuse of discretion. *Carbo Ceramics, Inc. v. Keefe*, 166 Fed. Appx. 714, 717, 2006 WL 197340, at *1 (5th Cir. 2006) (not selected for publication in the Federal Reporter) (citation omitted). Nevertheless, just like the First, Second, Third,

and Fourth Circuits, the Fifth Circuit scrutinizes the grant of a new trial more closely than it scrutinizes the denial of a new trial, and unless the Fifth Circuit is able to independently satisfy itself that the jury verdict was against the great weight of the evidence, it will not affirm the grant of a new trial. *Id.*

As in the other circuits, abuse of discretion is the articulated standard of review in the Sixth Circuit for the grant of a new trial. *Denhof v. City of Grand Rapids*, 494 F.3d 534, 543 (6th Cir. 2007). In practice, however, the Sixth Circuit exercises a "closer degree of scrutiny and supervision" when reviewing the grant of a new trial premised on insufficient evidence than it exercises when reviewing the grant of a new trial premised on some other basis, such as "some undesirable or pernicious influence obtruding into the trial." *Id.* (citations omitted). Therefore, unless the jury's verdict is unreasonable, the Sixth Circuit will not affirm the grant of a new trial. *Id.*

With regard to the Seventh Circuit, Petitioners cite *Medcom Holding Co. v. Baxter Travenol Lab., Inc.*, 106 F.3d 1388 (1997). In *Medcom*, the Seventh Circuit stated that it had, at one time, applied a "somewhat more exacting" standard of review than ordinary abuse of discretion to the grant of a new trial but that such practice is no longer necessary in light of *Gasperini*. *Id.* at 1397. Despite that statement, however, the Seventh Circuit went on to hold in *Medcom* that the district court had abused its discretion in vacating the first jury's verdict and in ordering a new trial. *Id.* at 1405-06. What is more,

the justification given for its holding was that the evidence was "sufficient" to support the verdict and that the jury awards had "a reasonable basis." *Id.* at 1402, 1405-06. "Sufficient" and "reasonable" suggest that the Seventh Circuit does not, in practice, give any more deference to the district court's grant of a new trial than the other circuit courts give. Therefore, even though the Seventh Circuit claims that it no longer applies a "somewhat more exacting" standard of review to the grant of a new trial, in actuality, it does.

Petitioners list the Eighth Circuit as being another one of five circuit courts to apply a lower standard of federal appellate review to the grant of a new trial. As in all of the other circuits, the articulated standard of review in the Eighth Circuit is abuse of discretion. *United States v. Bertling*, 510 F.3d 804, 807 (8th Cir. 2007) (citation omitted). Although the Eighth Circuit does not speak in terms of "closer scrutiny" or "more stringent scrutiny" with regard to the grant of a new trial premised on insufficient evidence, the Eighth Circuit has stated that "[m]otions for new trials based on the weight of the evidence are generally disfavored" and that "the district court must grant a new trial 'sparingly and with caution.'" *Id.* at 808. Thus, the Eighth Circuit will overturn a district court's decision to grant a new trial if "the evidence in a particular case does not 'preponderate [ ] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand.'" *Id.* at 808 (citation omitted).

Like the First Circuit, Petitioners cite no authority from the Ninth Circuit with regard to the proper standard of appellate review for the grant of a new trial premised on insufficient evidence. As in all of the other circuits, though, the articulated standard of review in the Ninth Circuit is abuse of discretion. *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248 (9th Cir. 1998) (citations omitted). However, the Ninth Circuit is one of several circuit courts that actually uses the "stringent standard" language to describe the standard of review that is applied to the grant of a new trial based on insufficient of evidence. *Id.*

The articulated standard of appellate review in the Eleventh Circuit for the grant of a new trial premised on insufficient evidence is also abuse of discretion. *United States v. Hernandez*, 433 F.3d 1328, 1337 (11th Cir. 2005). And, like the Ninth Circuit, the Eleventh Circuit speaks in terms of "close scrutiny." *Id.*

The District of Columbia Circuit is no different. Like all of the circuit courts of appeals, the articulated standard of review for the grant of a new trial is abuse of discretion, and "a more searching inquiry" is made when reviewing the district court's *grant* of a new trial, particularly when the grant was premised on insufficient evidence. *Langevine v. Dist. of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997) (citations omitted).

In the instant case, the Tenth Circuit expressly stated that it reviews a trial judge's decision on a

motion for new trial for *abuse of discretion* but that it examines the *grant* of a new trial based on insufficient evidence more closely than it examines the *denial* of a new trial to ensure that the district court does not substitute its judgment for that of the jury. Pet'r App. pp. 15a-16a.

In light of the foregoing authority, it could not be any clearer that the Tenth Circuit applied the very same standard of review that the other circuit courts apply when reviewing the grant of a new trial based on insufficient evidence. Although the terminology used to describe the standard of review differs somewhat between circuits, the standard of review actually applied is the same. As such, this Court should deny the Petition for a Writ of Certiorari with regard to the standard-of-review issue.

III. The Tenth Circuit Correctly Reinstated The Punitive Damages Awards Against Petitioners, Because The Amount Of The Punitive Damages Awards Is Nearly Three Times *Less* Than The Probable Amount Of Compensatory Damages That Will Be Awarded After Remittitur.

Petitioners' argument that the Tenth Circuit erred in reinstating the punitive damages awards while remitting or remanding most of the compensatory damages is extremely weak. Respondents recognize that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *BMW*

of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (U.S. 1996) (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (U.S. 1993)). Respondents further recognize that the ratio of the punitive damages award to the actual harm inflicted on the plaintiff is a factor to consider in determining whether a punitive damages award violates the Due Process Clause. *BMW of N. Am., Inc.*, 517 U.S. at 581. Even further, Respondents recognize that setting a punitive damages award at "two, three, or four times the size of compensatory damages, while 'not binding,' is 'instructive,' and that '[s]ingle-digit multipliers are more likely to comport with due process.'" *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1061-62 (U.S. 2007) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). However, the punitive damages awarded in the instant case are not even remotely close to violating the single-digit multiplier rule, as the punitive damages award of $900,000 is nearly three (3) times *less* than the probable individual damages that will be awarded after remittitur. And, although corporate damages have yet to be determined, Petitioners' liability to the corporate Respondents has been determined, so the corporate Respondents are certain to be awarded ***some*** compensatory damages, which will further increase the compensatory damages award over the mere $900,000 punitive damages award.

The first jury awarded Respondent Alfred Milton Evans $300,000 in compensatory damages against Fogarty and $150,000 in compensatory damages

against Fritz. The Tenth Circuit reinstated both of those awards, holding that a combined award of $450,000 did not shock the judicial conscience.

With regard to Respondents John Majors, Joel Holcomb, Neal Thrift, Nancy Thrift, and Charles Parkhurst, the first jury awarded compensatory damages against Petitioners as follows:

	Award Against Fogarty	**Award Against Fritz**
John Majors	$825,000	$375,000
Joel Holcomb	$780,000	$390,000
Neal Thrift	$900,000	$450,000
Nancy Thrift	$900,000	$450,000
Charles Parkhurst	$600,000	$300,000
TOTAL	**$4,005,000**	**$1,965,000**

The Tenth Circuit held that these awards were appropriate for remittitur. Although the Tenth Circuit did not dictate the amount by which these awards should be reduced, it noted that the reduction in *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152 (10th Cir. 1981) was two-thirds. Thus, reducing each of these five (5) Respondents' awards by two-thirds, Respondents will recover the following amounts after remittitur:

	Award Against Fogarty	Award Against Fritz
John Majors	$275,000	$125,000
Joel Holcomb	$260,000	$130,000
Neal Thrift	$300,000	$150,000
Nancy Thrift	$300,000	$150,000
Charles Parkhurst	$200,000	$100,000
TOTAL	**$1,335,000**	**$655,000**

Hence, even after remittitur, these five (5) Respondents will still receive a combined total of $1,990,000 ($1,335,000 + $655,000) in compensatory damages.

With regard to Respondent Leroy Wheeler, the first jury awarded $177,000 in compensatory damages against Fogarty and $88,500 in compensatory damages against Fritz. The Tenth Circuit remanded the verdict and directed the trial court to enter a remittitur order of $1.00 in nominal damages against Fogarty and $1.00 in nominal damages against Fritz, for a total damages award of $2.00.

The first jury awarded Respondent Cynthia Majors $300,000 in compensatory damages against Fogarty and $150,000 in compensatory damages against Fritz. The Tenth Circuit recommended that Cynthia Majors' damages be reduced to $50,000, as was done to the plaintiff's emotional damages in *Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989).

With regard to Respondent Mary Parkhurst, the first jury awarded $600,000 in compensatory damages

against Fogarty and $300,000 in compensatory damages against Fritz. The Tenth Circuit did not suggest the amount of remittitur for Ms. Parkhurst's award but stated that it may counsel a reduction greater than two-thirds. Thus, assuming that the District Court reduces her award by an amount between three-fourths and four-fifths, Ms. Parkhurst will likely receive a total award of approximately $200,000.

Based upon the foregoing, the total ***individual*** damages – after remittitur – will most likely be somewhere in the neighborhood of $2,690,002 ($450,000 + 1,990,000 + $2.00 + $50,000 + $200,000). A $900,000 punitive damages award is almost three (3) times ***less*** than the amount of probable total individual damages that will be awarded after remittitur. And, although the corporate damages have yet to be determined, Petitioners' liability to the corporate Respondents has been determined and, therefore, the total compensatory damages for both the corporate Respondents and the individual Respondents will be even greater than $2,690,002, further widening the gap between the total compensatory damages awarded to Respondents and the mere $900,000 punitive damages awarded against Petitioners. Thus, Petitioners' argument that the Tenth Circuit should have remanded the punitive damages award to ensure that a reasonable relationship ultimately exists between the compensatory damages award and the punitive damages award is extremely weak.

Petitioners try to gain this Court's sympathy by stating that neither the State of Oklahoma nor insurance will pay the punitive damages awarded against them. However, Petitioners' own conduct necessitated punitive damages, and while the second jury awarded fewer punitive damages than the first jury did, the fact that two different juries, as well as the Tenth Circuit, have found Petitioners' conduct deserving of punitive damages is indicative of the reprehensibility of Petitioners' conduct.

Petitioners' having to pay the cost of acting with reckless or callous indifference, or with evil motive or intent, to the Respondents' rights to free speech does not arouse much sympathy from Respondents and should not arouse much sympathy from this Court, either. During the course of this seven-year litigation, Petitioners have avoided serving their punishment, and Respondents have gone without retribution. It is time for Petitioners to finally realize the magnitude of their actions, which can only be accomplished by payment of the first jury's punitive damages award. As such, this Court should deny the Petition for a Writ of Certiorari as to the punitive damages issue.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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App. 1

No. CIV-01-252-W

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

---

(1) ALFRED MILTON EVANS, et al.,

Plaintiff,

vs.

(1) MIKE FOGARTY, et al.,

Defendants.

DEFENDANTS' MOTION TO DISMISS
AND BRIEF IN SUPPORT

(Filed Apr. 4, 2001)

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) ALFRED MILTON EVANS, et al., Plaintiff,	)	
v.	)	**Case No. CIV-01-252-W**
(1) MIKE FOGARTY, et al., Defendants.	)	

DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

COME NOW the Defendants and respectfully request this Court to dismiss Plaintiffs' First Amended Complaint. Defendants submit the following brief in support of this request.

BRIEF IN SUPPORT

STATEMENT OF THE CASE

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983. The Plaintiffs claim their federal constitutional and statutory rights have been violated by the Defendants. Plaintiffs ask for injunctive, declaratory and monetary relief.

PROPOSITION I

THE ELEVENTH AMENDMENT PREVENTS THIS COURT FROM EXERCISING JURISDICTION OVER STATE OFFICIALS IN THEIR OFFICIAL CAPACITY WHEN THE PLAINTIFF IS SEEKING RELIEF OTHER THAN PROSPECTIVE INJUNCTIVE RELIEF.

Plaintiffs have brought suit against all of the Defendants in their official capacities. It is well settled that a suit against a person in his or her official capacity is, in fact, a suit against the entity itself. As the Supreme Court stated:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. . . . Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." . . . . As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.

Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). A judgment in a § 1983 action against an official "in his official capacity" imposes liability against the entity that he represents. *Brandon v. Holt,* 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985). Because an official capacity suit is, in fact, a suit against the entity, a plaintiff cannot recover money damages in such a suit. "The Court has held that, absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court." *Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 3102, 87 L.Ed.2d 114 (1985). *See also, Pennhurst State School v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67, 78-79 (1984). Here, there has been no waiver by the State of Oklahoma, *Nichols v. Department of Corrections,* 631 P.2d 746 (Okla. 1981), *see also* 51 O.S. §§ 151, et seq, and no congressional override. The Eleventh Amendment bars damages against the Defendants in their official capacities.

There is a further bar to damages against Defendants in their official capacities. When acting in those capacities, Defendants are not "persons" within the meaning of § 1983. The Supreme Court made that perfectly clear when it wrote: "we hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983." *Will v. Michigan Department of State Police,* 491 U.S. 58, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989), the Supreme Court left no doubt that an official acting in his official capacity is not a person under § 1983 and is immune from suit

by operation of the Eleventh Amendment. The Court held that:

> A state official who is sued in his or her official capacity for nonprospective relief is not a "person" under § 1983, because (1) a state is not a "person" under § 1983, and (2) a § 1983 suit for nonprospective relief against a state official in his or her official capacity is not a suit against the official, but rather is a suit against the official's office and, as such, is no different from a suit against a state itself.

Id., 105 L.Ed.2d at 58.

Generally, a State and its agencies are entitled to immunity under the Eleventh Amendment for actions brought in federal courts, whether the action seeks damages or equitable relief. However, there is another exception to this rule. A party may sue pursuant to *Ex Parte Young,* 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908). The *Ex Parte Young* doctrine holds that the Eleventh Amendment generally does not bar a suit against a state official in federal court which seeks only prospective equitable relief for violations of federal law. In the present case, Plaintiffs seeks [sic] injunctive, declaratory and monetary relief from Defendants. The Eleventh Amendment and the decision in *Will* both bar Plaintiffs' claims to the extent Plaintiffs seeks [sic] relief other that [sic] prospective injunctive relief. Accordingly, Defendants are entitled to denial of Plaintiffs' requested relief.

PROPOSITION II

THE PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED REGARDING COUNTS I, II & IV AGAINST DEFENDANTS FOGARTY, FRITZ, BROWN, AND ALL OHCA BOARD MEMBERS BECAUSE THE ALLEGATIONS IN THE COMPLAINT LACK ANY ALLEGATION OF PERSONAL PARTICIPATION AND LACK ANY SPECIFICITY REGARDING RETALIATION FOR PLAINTIFFS EVAN'S ALLEGED STATEMENTS.

In civil rights matters complaints must contain specific allegations of fact, which indicate a deprivation of constitutional rights. *Alfaro Motors, Inc. v. Ward,* 814 F.2d 883, 887 (2nd Cir. 1987). Allegations which contain general conclusions that shock a person, but omit specific allegations are not sufficient. *Barr v. Abrams,* 810 F.2d 358, 363 (2nd Cir. 1987). Moreover, it is clear that a civil rights complaint must allege personal participation by the Defendants to gain monetary relief. *Colon v. Coughlin,* 58 F.3d 865, 873 (2nd Cir. 1995). Allegations of respondent [sic] superior in section 1983 cases are not sufficient to survive a 12 (b) (6) motion. *Monell v. Dept. of Social Services of the City of New York,* 436 U.S. 658, 690-695, 98 S. Ct. 2018, 2035-2039, 56 L. Ed. 2d 611 (1978). A heightened pleading requirement is required however, when officials are sued in their individual capacities. *Lee v. County of Los Angeles,* 240 F.3d 754 (9th Cir. 2001). *See also Branch v. Tunnell,* 14 F.3d 449, 450 (9th Cir. 1994). This heightened pleading

requirement is especially important when knowledge, intent, and qualified immunity are possible defenses. *Id.*

The Plaintiffs seek monetary damages from the Defendants in this case. *See* Relief Requested on page 23 of the Amended Complaint, subsections E and F. In paragraphs 18 to 31 of the Complaint Plaintiffs describe Defendants. Defendant Fogarty is described as CEO of OHCA. Defendant Fritz is described as the Director of Behavioral Health for OHCA. Defendant Mitchell is described as the State Medicaid Director. Defendant Brown is described as the Legislative Liaison for OHCA. All OHCA Board members are described. But for Plaintiffs' allegation that Defendant Mitchell "is responsible for the termination of the Plaintiffs' Medicaid provider agreement" there is nothing but conclusory allegations in the Amended Complaint.

For example, in paragraph 22 Plaintiff [sic] state, "Each of these Defendants has taken steps under color of their official title to exercise the authority vested in them by the State of Oklahoma for purposes beyond the bounds of their official duties". In paragraphs 43 to 57 labeled "General Factual Allegations" the Plaintiffs state that "Defendants took this action", (paragraph 48), "Defendants notified" (paragraph 48), "as a result of the actions of Defendants" (paragraph 49) "affiliation . . . was discovered by Defendants" (paragraph 51), "a swarm of auditors from HCA descended" (paragraph 52), the Defendants were terminating the Plaintiff's provider agreement" (paragraph 55) "The Defendants and the Board members

consistently deny reimbursement" (paragraph 56) and finally "the Defendants action will necessarily result in the denial of adequate physical facilities" (paragraph 57).

In not one paragraph of these general allegations nor any allegation in the Counts later provided by Plaintiffs, do the Plaintiff [sic] identify which Defendant allegedly retaliated against the Plaintiffs. The Plaintiffs do not state what knowledge each Defendant had of his public speech. Plaintiff does not allege that any Defendant had intent to retaliate against Plaintiff Evans, Plaintiff SOFS, or recipient Plaintiffs. In fact, in paragraph 51 Plaintiffs allege (and this allegation must be taken as true) that Evans assumed a role with SOFS as a contract consultant rather than as an owner "to avoid retaliation.[1]

Given the fact that monetary damages are requested, and that Plaintiffs sue officials of the State in their individual capacities, and that these officials have a defense of qualified immunity in this case, Plaintiffs' allegations in the Amended Complaint do not arise to more than conclusory allegations. While the allegations may shock a reasonable person who reads them, nothing in the Amended Complaint other than the allegation that the Medicaid Director terminated a contract shows any retaliatory intent or knowledge of Mr. Fogarty, Ms. Fritz or Ms. Brown or

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[1] The inference here is that Plaintiff Evans sought to hide who he was so officials would not retaliate.

any Board member. Moreover, given the fact that legally the OHCA Board has no statutory operational responsibilities (Contrast 63 Okla. Stat. § 5007 with 5008) Plaintiffs' allegations that the Board retaliated must be plead for the Defendants to defend the case.

Plaintiffs' Complaint fails to specifically plead personal participation on behalf of the Defendants. Plaintiffs merely plead general allegations. Accordingly, Plaintiffs' Complaint does meet the requirements necessary to survive a 12(b)(6) motion to dismiss

PROPOSITION III

DEFENDANTS FOGARTY, FRITZ, MITCHELL AND BROWN ARE ENTITLED TO QUALIFIED IMMUNITY, IN THEIR INDIVIDUAL CAPACITIES ON PLAINTIFFS' FIRST AMENDMENT CLAIMS.

There is within the jurisprudence of this country a qualified immunity which shields a public official from lawsuits. The immunity finds its basis in a balancing of the interests of the public.[2] The immunity is an

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[2] As the United States Court of Appeals for the Eleventh circuit has stated:

> Suits against government officials for damages against them individually are costly not only for the defendants, but for society as a whole. The social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.

(Continued on following page)

"*immunity from suit* rather than a mere defense to liability." *Hunter v. Bryant,* 502 U.S. 224, 116 L.Ed.2d 589, 595 (1991) (emphasis supplied). As this is an immunity from suit, the United States Supreme Court has repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation. *Id.*

Qualified immunity, according to the United States Supreme Court, holds that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). As a result;

> [t]he qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. The accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued.

> Qualified immunity recognizes that where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences.

Post v. City of Fort Lauderdale, 7 F.3d 1552, 1556 (11th Cir 1993) (internal citations omitted).

Hunter v. Bryant, 502 U.S. ___, 116 L.Ed.2d 589, 596 (1991).

The procedure for analyzing a defense of qualified immunity is as follows:

> Once the defendant raises a qualified immunity defense, the plaintiff assumes the burden of showing that the defendant violated the clearly established law. To overcome the qualified immunity defense, the Plaintiff must identify a clearly established statutory or constitutional right of which a reasonable person would have known, and then allege facts to show that the defendant's conduct violated that right.

Breidenbach v. Bolish, 126 F.3d 1288, 1291 (10th Cir. 1997)

A. Presumption in favor of Qualified Immunity.

There exists a presumption of qualified immunity in favor of the Defendants. Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from a suit for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard. *Davis v. Scherer,* 468 U.S. 183, 190, 104 S.Ct. 3012, 82 L.Ed.2d 139, 147 (1984).

B. Plaintiffs Burden.

Once the defendant raises qualified immunity, the plaintiff must come forward with additional allegations. *Sawyer v. County of Creek,* 908 F.2d 663, 665 (10th Cir. 1990). The Tenth Circuit has stated that a plaintiff cannot meet his burden to demonstrate that the right in question was clearly established by "merely identifying a clearly established right and then alleging that the defendant has violated it. The contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Id.* at 666. "Once a qualified immunity defense has been raised . . . , the plaintiff is held to a heightened standard of pleading." *Id.* at 667. See also, *Breidenbach v. Bolish, supra* at 1292.

The burden is on the Plaintiff to both plead and prove that federal rights were clearly established and that a violation of those clearly established rights occurred. *Applewhite v. U.S. Air Force,* 995 F.2d 997, 1000-01 (10th Cir. 1993). The "clearly established" standard is difficult for a plaintiff to meet. *Medina v. City and County of Denver,* 960 F.2d 1493, 1498-99 (10th Cir. 1992). "Clearly established" is predicated on a finding that "in light of pre-existing law the unlawfulness is apparent." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Plaintiff must show that a reasonable person would have understood that his actions violated clearly established federal rights. *Jantz v. Muci,* 976 F.2d 623, 627 (10th Cir. 1992). Failure to convince the

court that the law was clearly established calls for the dismissal of the complaint with prejudice, *Sawyer, supra,* at 667; or entry of judgment for the defendants. *Hidahl v. Gilpin County DSS,* 938 F.2d 1150, 1155 (10th Cir. 1991).

C. How "clear" must the law be to be "Clearly established?"

In determining whether the law is clearly established, the 10th Circuit has stated that: for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City and County of Denver,* 960 F.2d 1493, 1498 (10th Cir. 1992) (citation omitted).

D. State of the "clearly established" law relating to the First Amendment protections of a government contractor.

In the case of *Board of County Com'rs, Wabaunsee County, Kan v. Umbehr,* 116 S.Ct. 2342, 518 U.S. 668, 135 L.Ed.2d 843 (1996), the Supreme Court addressed the issue of the level of First Amendment protection a government contractor may claim. The Court ruled that government contractors are entitled to First Amendment protections, subject to application of the balancing test set out in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Co.,*

Ill., 88 S.Ct. 1731, 391 U.S. 563, 20 L.Ed.2d 811(1968). However, the *Umbehr* Court refused to establish a bright line rule for establishing a government contractors First Amendment protections.

In the *Pickering* case the Court held that a government employee has First Amendment protections when speaking about the governmental employer. However, the *Pickering* Court did not establish a bright line rule that all speech of a governmental employee is protected. The Court established a balancing test that requires the reviewing court to weigh the interests of the employee against the interest of the government. In *Pickering* the Court stated;

> [W]e do not deem it either appropriate or feasible to attempt to lay down a general standard against which all statements may be judged. . . . However, in the course of evaluating the conflicting claims of First Amendment protection . . . , we shall indicate some of the general lines along which an analysis of the controlling interests should run."

Pickering at 1735.

The Supreme Court in *Pickering* clearly established that government employees have First Amendment Protection sometimes, but the Court was not sure exactly when those times are, so it established a test for the reviewing courts to utilize on a case by case basis.

The *Umbehr* Court adopted the "general lines" of the *Pickering* Court and said that this will be the test for evaluating a government contractors First Amendment Protections. The *Umbehr* Court stated;

> We therefore see no reason to believe that proper application of the *Pickering* balancing test cannot accommodate the differences between employees and independent contractors. There is ample reason to believe that such a nuanced approach, which recognizes the variety of interests that may arise in independent contractor cases, is superior to a bright-line rule distinguishing independent contractors from employees.

Umbehr at 2349.

To make this perfectly clear. It has been clearly established by the United States Supreme Court, that when evaluating a government contractors First Amendment protections that the reviewing court is to utilize a nuanced approach with no bright line rule that recognizes the variety of interests that may arise in independent contractor cases, however there is not a general standard against which all statements may be judged.

The Tenth Circuit ruled that the defendants were entitled to qualified immunity in their individual capacities due to the uncertainty of the law in the area of a government contractor's First Amendment protections. *Umbehr v. McClure,* 44 F.3d 876 (10th

Cir. 1995).[3] This decision was made before the nuanced approach of *Board of County Com'rs, Wabaunsee County, Kan v. Umbehr,* 116 S.Ct. 2342, 518 U.S. 668, 135 L.Ed.2d 843 (1996) was established. However, the law in the area of a government contractor's First Amendment protection is still very unclear.

Just last year the Eleventh Circuit granted qualified immunity to government employees, sued in their individual capacity, by a government employee, that claimed her First Amendment rights had been violated. The Court stated:

> Because the analysis of First Amendment retaliation claims under the Pickering-Connick test "involve[s] legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules . . . a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful."

Maggio v. Sipple, 211 F.3d 1346, 1354 (11th Cir. 2000) citing *Martin v. Baugh,* 141 F.3d 1417, 1420 (11th Cir.1998).

The United States Supreme Court and the federal courts of appeal struggle when evaluating First Amendment claims by government employees and

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[3] This is the case that was appealed in *Board of County Com'rs, Wabaunsee County, Kan v. Umbehr,* 116 S.Ct. 2342, 518 U.S. 668, 135 L.Ed.2d 843 (1996), however the issue of qualified immunity was not appealed. *See Umbehr* at 2346.

government contractors. If the justices in the highest courts in the land have difficulty determining this issue it is reasonable to assume that employees of the Oklahoma Health Care Authority will have difficulty. It has not been clearly established that Plaintiffs are entitled to First Amendment protections.

E. Motion to Dismiss and Qualified Immunity.

The only thing that is clear in the present case is that the Defendants are entitled to qualified immunity. The United States Supreme Court cannot determine with certainty when a government contractor is entitled to First Amendment protections. Defendants, Fogarty, Fritz, Mitchell and Brown are shielded from liability for civil damages because their conduct did not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Accordingly, Defendants Fogarty, Fritz, Mitchell and Brown are entitled to qualified immunity.

PROPOSITION IV

THE COURT SHOULD ABSTAIN FROM DECIDING PLAINTIFF'S CLASS CLAIMS BASED UPON THE BURFORD ABSTENTION DOCTRINE.

In Counts II, VI, VII, and VIII, the Plaintiffs bring class claims against the Defendants. *See* Paragraph 38 of Amended Complaint. More specifically, in

Count II the Plaintiffs allege a violation of their First Amendment Rights (a disruption of services, para. 67 of Amended Complaint); in Count VI the Plaintiffs allege that they are denied reasonable access to and adequate quality of care (the denial of reimbursement and arbitrary and capricious termination of contract of SOFS, para. 87 of Amended Complaint); in Count VII they allege a violation of amount, scope and duration (significantly disrupted services . . . deemed to be medically necessary, para. 95 of Amended Complaint); and in Count VIII they claim a violation of the Developmental Disabilities Assistance Act (termination of treatment by certain clinicians and lack of other treatment, para. 103 of Amended Complaint). In all these claims the Plaintiff Class asserts that the disruption or elimination of medically necessary services or inadequate reimbursement at SOFS will damage them.

In the case of *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), the United States Supreme Court considered an appeal from the Fifth Circuit Court of Appeals regarding an administrative order from the Railroad Commission. In this case, the Railroad Commission had issued a permit to drill four (4) oil wells on the east Texas field. The jurisdiction of the Court was based upon diversity of citizenship and the challenge to the Order was based upon alleged due process improprieties in the issuance of the Order. The Supreme Court assumed jurisdiction was proper but decided as a matter of sound equitable discretion to abstain from deciding

the case. The Court's reasoning was that the complexities of Texas' oil and gas law dictated that the federal court abstain from deciding the case. Moreover, the Court found Texas had a well-organized system of regulation and review. The review process was legislated to prevent multiple courts from deciding oil and gas issues.

The theoretical underpinnings of the *Burford* doctrine has been described in the case of *Bethphage Lutheran Service, Inc. v. Weicker,* 965 F.2d 1239, 1243 (2nd Cir. 1992) as follows:

> The Supreme Court has characterized *Burford* abstention as appropriate where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. We have held that the aim of *Burford* abstention is to "avoid resolving difficult state law issues involving important public policies or avoid interfering with state efforts to maintain a coherent policy in an area of comprehensive regulation or administration," ("[A]bstention pursuant to *Burford* is designed to avoid federal court interference with specialized ongoing state regulatory schemes . . . ").

The *Burford* doctrine underpinnings has [sic] been recognized as applicable in the Medicaid program in the case of *Osteopathic Hospital Founders Assn., Inc. v. Splinter,* 955 F. Supp. 1351 (N.D. Okla. 1996). In this case the United States District Court for the

Northern District of Oklahoma held that the *Burford* abstention doctrine applied to a Medicaid reimbursement case in which the Plaintiff hospital sought injunctive relief in higher reimbursement rates from the Oklahoma Health Care Authority. The Osteopathic Hospital court considered four questions to determine the applicability of the Burford doctrine: (1) did the Medicaid regulations provide a comprehensive statutory framework to formulate policy and decide cases; (2) was there a state scheme of regulation that should be properly interpreted by a state agency; (3) was the subject matter in Medicaid an area of legitimate state interest; and (4) was the issue one of complex and difficult state law.

In the present case this Court should find that the *Burford* abstention doctrine applies to dismiss the claims of the class members. First, a complex statutory framework in Medicaid currently exists for clients who have services denied, services suspended, or are denied services because of medical necessity decisions. This regulatory scheme is broadly defined by federal law and carried out by the Defendants through the Oklahoma Administrative Procedures Act. Under 42 U.S.C. § 1396A(a) (3) and 42 C.F.R. § 431.210 evidentiary hearings must be conducted for those whose services are denied or suspended. See also OAC (Oklahoma Administrative Code) § 317:2-1-2.[4]

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[4] Under OHCA's administrative rules, if the case involves a recipient then a "Program Panel" of agency experts hears the case before an evidentiary hearing is held. OAC 317: 2-1-2.2.

After an administrative hearing, review under state law exists with the Chief Executive Officer of the Oklahoma Health Care Authority and the state district court. 63 Okla.Stat. § 5052(D) (Supp. 2000). Under this complex process there are three levels of agency administrative review (the Program Panel, the ALJ and the CEO) as well as state district court review. Under the second factor for abstention to apply, the Court should find that the agency should be given the authority to interpret its regulations in the Medicaid program. As for adequacy of rates, the Osteopathic case specifically noted the state's need to control reimbursement and the problem with divisive reimbursement rates possibly caused by federal court judgments. More importantly here, questions surrounding the medical necessity of services and the adequacy of services, quality of services and the denial of services are best left to the judgment of the state agency. The uniformity of these decisions is imperative for the Medicaid agency to properly administer the State Plan. With respect to the third factor in applying the *Burford* doctrine, the Court should find that the state remedy is available to each recipient named by the Plaintiff and the remedy is afforded each recipient. Finally, regarding the fourth prong of the test to apply the *Burford* doctrine, the Court should find the question regarding what care is medically necessary and whether there is disruption of services due to the termination of one service provider are complex questions which require the application of Medicaid law. As the Court is aware by the pleadings, each of the recipients has a different

disease, a different treatment course and a different set of both pharmacological needs, as well as therapy needs. Each of these cases is best left to state officials who can devote its administrative process to develop the facts to entertain the complaints of the Plaintiffs.

Based on the complexity of the federal law in this case and state remedy afforded each recipient, this Court should dismiss the claims of the class because of the *Burford* abstention doctrine.

PROPOSITION V

THE COURT SHOULD DISMISS COUNT III BECAUSE THERE IS NO CONSTITUTIONAL PROPERTY INTEREST THAT WOULD NECESSITATE DUE PROCESS RIGHTS TO PLAINTIFFS.

In Count III of the Amended Complaint Plaintiff asserts that "Plaintiff had a clearly established property interest in the facilities operated by SOFS and in the continued operation of business at those facilities. This includes the continued receipt of Medicaid reimbursement." *See* Amended Complaint, para. 68. Plaintiff also asserts that this right was taken without due process, and without any rational basis. *See* Amended Complaint para. 73.

The contract between the Health Care Authority and SOFS involves no constitutionally protected property interest in the Medicaid program.

The law in this area of Medicaid is clear and longstanding. In the case of *Geriatrics, Inc. v. Harris,* 640 F.2d 262 (10th Cir. 1981) (cert. denied 454 U.S. 832, 70 L.Ed. 2d 109, 102 S. Ct. 129) the United States Court of Appeals for the Tenth Circuit considered a case in which the Colorado Medicaid agency decided not to renew a Medicaid contract to a nursing home. The claim of the plaintiff in the case was that the State of Colorado could not fail to renew the contract without a hearing and due process. The allegations of the Plaintiffs in this case are very similar to the allegations in the Amended Complaint in this case. The Tenth Circuit stated,

> Eventide assets that it had an expectation of continued participation in the Medicaid Program and this was a "property interest" to be protected under due process. Also, that it had more than a unilateral claim or mere expectance.

Geriatrics, Inc. 640 F.2d at 265.

In finding no property interest protectable under the United States Constitution, or federal Medicaid statutes, the Court stated:

> Eventide is not the intended beneficiary of the Medicaid program. Instead, the purpose underlying the funding program is to extend financial benefits to the patients eligible to receive their medical care at government expense. Eventide argues also that termination of benefits would force the Home to close and that it therefore has a significant financial

> interest to retain its certification. The Home's financial need for government assisted patients is incidental to the purpose and design of the program. Eventide's operating license has not been resided and it may still operate as a nursing home and render care to private-pay patients. The unfortunate reality that it will probably encounter difficulty operating at capacity is not of constitutional significance.

Geriatrics, Inc. v. Harris, 640 F.2d 262, 265 (10th Cir. 1981).

Similarly, in the case of *Kelly Care, LTD. v. O'Rourke,* 751 F.Supp. 1154 (S.D. N.Y. 1990) (aff'd at 930 F.2d 170, cert. denied 502 U.S. 907, 116 L.ED. 2d 244, 112 S.Ct. 300) The State of New York cancelled the contract with the provider, giving the provider notice for a non-cause termination for personal care services to Medicaid recipients. The Plaintiffs sued the state and alleged that its due process rights were violated and requested injunctive relief under constitutional and federal law. The Plaintiffs also alleged that a constitutional liberty interest was raised by the mere implication that the termination of a contract had negative implications. The Court rejected both arguments finding no property or liberty interest claim.

While it is unclear what plaintiffs in the Amended complaint have this due process interest, like Plaintiff SOFS and Plaintiff Evans, no Medicaid recipient has any protectable life, liberty, or property

interest in receiving services from a particular provider after being transferred from one Medicaid provider to another. *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 785, 65 L.ED. 2d 506, 518, 100 S. Ct. 2467 (1980).

In the present case, the Court should dismiss Count III from the Amended Complaint against all Defendants. Plaintiffs have no protectable property or liberty claim in the contract with OHCA.

PROPOSITION VI

THE COURT SHOULD DISMISS PLAINTIFF'S CLAIMS IN COUNT V BECAUSE PLAINTIFFS DO NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In Count V of the Amended Complaint Plaintiffs continue to allege that Defendants violated 42 U.S.C. § 1396 A (a)(13) with regard to adequate reimbursement. Plaintiffs simply assert that Defendants circumvented and ignored the "proper method" to set reimbursement rates. Further, the Plaintiff's claim reimbursement has been denied them during their course of business.

Nowhere in the Amended Complaint does Plaintiff state what basis in law the reimbursement rates were set improperly, or how reimbursement has been denied. If the Court were to accept Plaintiff's allegations as true, no violations of law would occur. First, 42 U.S.C. § 1396 A (a)(13) was repealed in 1997. *See* Section 4711 of (a) of Pub. L. 105-33 (1997). *See* also

Page 12 of the Court's Order dated February 12, 2001. Despite the Court's finding the Plaintiff continues to assert the claim.

Second, the current version of 42 U.S.C. § 1396 A (a) (13) does not protect Plaintiff's business. It provides,

> for a public process for determination of rates of payment under the plan for hospital services, nursing facility services, and services of intermediate care facilities for the mentally retarded. . .

Plaintiff is not a hospital, a nursing facility or an intermediate care facility for the mentally retarded. *See* paragraphs 6,7, and 8, Amended Complaint. Because this statute does not afford Plaintiffs any protection and the Plaintiff has failed to identify any other state or federal law which dictates how Plaintiff is protected by the setting of rates, the claims in Count V should be dismissed.

PROPOSITION VII

PLAINTIFF CLAIMS IN VII SHOULD BE DISMISSED BECAUSE BASED UPON THE MEDICAID REQUIREMENTS OF AMOUNT, SCOPE AND DURATION NO VIOLATION OF LAW CAN OCCUR ASSUMING THE ALLEGATIONS IN THE COMPLAINT ARE TRUE.

The Plaintiff in paragraphs 43 to paragraph 57 allege that in retaliation of Mr. Evan's First Amendment rights, OHCA cancelled the contracts of two (2)

behavioral health facilities. Based upon this single set of facts, in paragraphs 92 to 99 Plaintiffs assert that "amount, scope, and duration" of services has been violated. More specifically, Plaintiffs allege that, "the termination of the SOFS Medicaid provider agreement will significantly and drastically reduce the availability of mental health and behavioral health services in Southeastern Oklahoma." Also, Plaintiffs allege that "Defendants actions have disrupted services or will lead to grossly unequal services." Based upon the Amended Complaint all of Plaintiff's charges are based upon SOFS' termination as a provider.

Under the Medicaid Act the requirement of amount, scope and duration is found at 42 U.S.C. § 1396 A(a) (10) (B). This statute provides that the medical assistance made available to any individual described in subparagraph (A) (those who are categorically or medically needy) "shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual. . . ." The federal regulation underlying this federal law requirement provides:

> The plan must specify the amount, duration, and scope of each service that it provides for –
>
> (1) The categorically needy; and
>
> (2) Each covered group of medically needy.

> Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose
>
> The Medicaid Agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440,210 and 440,220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.
>
> The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

The Plaintiff's claim should be dismissed on this claim because the sole claim of the Plaintiff is the absence of SOFS's participation in the program somehow violates the amount, scope and duration requirement. The requirement of amount, scope, and duration in the Medicaid program involves a requirement of services in the "State Plan". Both the requirement of statute and the regulation begins with, "the State Plan or the plan must". The State Plan is the agency's blueprint for the services it covers. *See* 42 CFR § 431.40 and 431.50. There is not a single allegation in the Amended Complaint, in all 103 paragraphs regarding the State Plan and how it denies any recipient services. Assuming allegations in the Complaint are true, nothing in the state plan denies any recipient any service. Furthermore, every case Defendant's counsel could find construing the amount, scope, and duration requirement involves the systemic denial of a certain service to a recipient

not a denial of one provider's contract. For example, in *Hern v. Beye,* 57 F.3d 906 (10th Cir. 1995) the Tenth Circuit Court of Appeals considered the State of Colorado's systemic restriction of abortion services. In *DeSario v. Thomas,* 139 F.3d 80 (2nd Cir.1998) the Second Circuit considered Connecticut's systemic use of a list to allow or disallow durable medical equipment services. In *Ledet v. Fischer,* 638 F. Supp1288 (M.D. La. 1986) the Court considered the State of Louisiana's plan which limited services to one pair of glasses after cataract surgery. In none of these cases, or any case construing this section of the law is amount, scope or duration violated by the absence of one or two contractors in the Medicaid Program. Based upon all of the allegations in Count VII of the Amended Complaint Plaintiffs have not stated a claim upon which relief can be granted.

PROPOSITION VIII

PLAINTIFF'S CLAIM UNDER COUNT VIII FOR A VIOLATION OF 42 U.S.C. § 6009 SHOULD BE DISMISSED BECAUSE THIS LAW HAS BEEN REPEALED.

In paragraphs 100 to 103 of the Amended Complaint the Plaintiffs allege that 42 U.S.C. § 6009 was violated by Plaintiff's ability to no longer receive services at SOFS. As the Court pointed out in its order of February 12, 2001, 42 U.S.C. § 6009 was repealed by Public law No. 106-402 § 1401 (a). Even prior to the repeal of this law, the United States Supreme Court ruled that the Bill of Rights did not

confer any substantive rights to treatment for disabled persons and that Congress had unconstitutionally attempted to exert its power under the spending clause by enacting the law. *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 18, 101 S.Ct. 1531, 67 L.Ed. 2d 694, 708 (1981). For these reasons, the claims in Count VIII should be dismissed.

PROPOSITION IX

THE CLASS PLAINTIFFS' FREEDOM OF ASSOCIATION CLAIM IS WITHOUT MERIT.

Count II of Plaintiffs' Complaint proposes that the alleged retaliation by the Defendants violates the class Plaintiffs' First Amendment right of freedom of association. The question is, freedom to associate with whom? The class Plaintiffs do not assemble as a group for purposes of associating to advocate mental health rights. The class Plaintiffs individually seek treatment for behavioral health issues. Likewise, the class Plaintiffs do not associate with SOFS as a group for the purpose of exchanging ideas. Plaintiffs go to SOFS for treatment. The First Amendment protects certain intimate human relationships as well as the right to associate for the purpose of engaging in those expressive activities otherwise protected by the Constitution. *Freeman v. City of Santa Anna,* 68 F.3d 1180, 1188 (9th Cir. 1995).

The class Plaintiffs have not been deprived of an associational right guaranteed by the Constitution.

Accordingly, Count II of Plaintiffs' Complaint should be dismissed.

PROPOSITION X

THE CLASS PLAINTIFFS' CLAIM FOR REASONABLE ACCESS AND ADEQUATE QUALITY IS WITHOUT MERIT.

The class Plaintiffs allege, at Count VI of the Complaint, that they have been denied access to Medicaid services and certain levels of quality in care. At paragraph 87 of the Complaint Plaintiffs claim that the denial of services was caused by the "denial of reasonable and adequate reimbursement to healthcare providers and the arbitrary and capricious termination of SOFS' Medicaid provider agreement." *See* paragraph 87 of Plaintiffs' Complaint. These facts to not give rise to a cause of action. SOFS' Medicaid provider agreement has not been terminated. In addition, Plaintiffs argument as to denial of reasonable and adequate reimbursement is the same argument mad [sic] at Count V of Plaintiffs' Complaint. Defendant has briefed the reasons why County [sic] V of Plaintiffs' Complaint should be dismissed at Proposition VI of this brief. The same argument applies to Plaintiffs' reasonable and adequate reimbursement argument in Count VI of the Complaint. Accordingly, Count VI of Plaintiffs' Complaint should be dismissed.

CONCLUSION

Wherefore based on the foregoing arguments and authorities Defendants respectfully request this Court to dismiss Plaintiff's Complaint and award Defendants a reasonable attorney's fee; plus any other relief this Court deems just and proper.

Respectfully submitted,

/s/ Greg S. Eldridge
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF MAILING

On this 4th day of April, 2001, a true and correct copy of the foregoing was filed and mailed, postage prepaid, to:

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/s/ Greg S. Eldridge
GREG S. ELDRIDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) ALFRED MILTON EVANS, an individual, and (2) SOUTHEASTERN OKLAHOMA FAMILY SERVICES. INC., a corporation,	)	
Plaintiffs,	)	
vs.	)	**Case No. CIV-01-252-HE (Consolidated Case Number)**
(1) MIKE FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority, (2) TERRI FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority, (3) DR. LYNN MITCHELL, in her individual capacity, as well as in her official capacity as State Medicaid Director for the Oklahoma Health Care Authority, (4) DANA BROWN, in her individual capacity, as well as in her official capacity as Legislative Liaison from the Oklahoma Health Care	)	

Authority, (5) JANA LEA WEBB, in her individual capacity, as well as in her official supervisory capacity on behalf of the Oklahoma Health Care Authority, (6) T.J. BRICKNER, JR., in his official capacity as Vice-Chairman of the Oklahoma Health Care Authority, (7) RONALD ROUNDS, O.D., in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (8) WAYNE HOFFMAN, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (9) JERRY HUMBLE, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (10) CHARLES ED McFALL, in his official capacity as Chairman of the Oklahoma Health Care Authority Board of Directors, (11) GEORGE MILLER, in his official capacity as a member of the Oklahoma Health Care Authority

Board of Directors,
(12) LYLE ROGGOW,
in his official capacity as
a member of the Oklahoma
Health Care Authority
Board of Directors, and
OKLAHOMA FOUNDATION
FOR MEDICAL QUALITY,
INC.,

Defendants.

and

(1) RUSTLING WINDS,
INC., an Oklahoma corpo-
ration, (2) TEN-KILLER
BEHAVIORAL SERVICES,
INC., an Oklahoma corpo-
ration, (3) MORNING
STAR MENTAL HEALTH
SERVICES, INC., an
Oklahoma corporation,
(4) DIVERSIFIED FAMILY
SERVICES, INC., an
Oklahoma corporation,
(5) SERENITY SPRINGS
MENTAL HEALTH SER-
VICES, L.L.C., an Okla-
homa limited liability
company, (6) JCH INCOR-
PORATED, an Oklahoma
corporation, (7) NORTH-
EAST OKLAHOMA, INC.,
an Oklahoma corporation,
(8) DAVETTA McINTOSH,
an individual, (9) NEAL

THRIFT, an individual, (10) NANCY GRAVES-THRIFT, an individual, (11) JOHN MAJORS, an individual, (12) CINDY MAJORS, an individual, (13) CHARLES PARKHURST, an individual, (14) MARY PARKHURST, an individual, (15) LEROY WHEELER, an individual, (16) EDNA KEATON, an individual, and (17) JOEL HOLCOMB, an individual,

Plaintiffs,

v.

(1) MIKE FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority, (2) TERRI FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority, (3) DR. LYNN MITCHELL, in her individual capacity, as well as in her official capacity as State Medicaid Director for the Oklahoma Health Care Authority,

Case No. CIV-01-557-HE

(4) DANA BROWN, in her individual capacity, as well as in her official capacity as Legislative Liaison from the Oklahoma Health Care Authority, (5) JANA LEA WEBB, in her individual capacity, as well as in her official supervisory capacity on behalf of the Oklahoma Health Care Authority, (6) T.J. BRICKNER, JR., in his official capacity as Vice-Chairman of the Oklahoma Health Care Authority, (7) RONALD ROUNDS, O.D., in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (8) WAYNE HOFFMAN, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (9) JERRY HUMBLE, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (10) CHARLES ED McFALL, in his official capacity as Chairman of the Oklahoma Health Care Authority

Board of Directors,
(11) GEORGE MILLER,
in his official capacity as
a member of the Oklahoma
Health Care Authority
Board of Directors,
(12) LYLE ROGGOW,
in his official capacity as
a member of the Oklahoma
Health Care Authority
Board of Directors, and
OKLAHOMA FOUNDATION
FOR MEDICAL QUALITY,
INC.,

Defendants.

STATE DEFENDANTS' ANSWER TO THIRD AMENDED COMPLAINT

(Filed Jul. 17, 2002)

1. Defendants Mike Fogarty, Terri Fritz, Dr. Lynn Mitchell, Dana Brown, Jana Lea Webb, T.J. Brickner, Jr., Ronald Rounds, O.D., Wayne Hoffman, Jerry Humble, Charles Ed McFall, Wayne Hoffman, George Miller, and Lyle Roggow (State Defendants hereafter) deny each and every allegation in Plaintiffs' Third Amended Complaint (Complaint) except as specifically admitted herein.

2. State Defendants admit this action is brought pursuant to 42 USC § 1983 but deny the remaining allegations in Complaint ¶ 1.

3. State Defendants admit Complaint ¶¶ 3, 4, 5, 7, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 24, and 31.

4. State Defendants are without knowledge or information sufficient to admit or deny Complaint ¶¶ 6, 33, 34, 38, and 39 and therefore deny the same.

5. Complaint ¶ 8 requires no response.

6. State Defendants admit Dana Brown is an Oklahoma resident employed by the Oklahoma Health Care Authority (OHCA) as a Governmental Relations Director but deny the remaining allegations in Complaint ¶ 12.

7. State Defendants admit Jana Lea Webb is an Oklahoma resident employed by OHCA as Supervisor of the Surveillance Utilization and Review Subsystem but deny the remaining allegations in Complaint ¶ 13.

8. State Defendants admit this action is brought against Fogarty, Fritz, Mitchell, Brown and Webb in their individual and official capacities and that they acted under color of state law but deny the remaining allegations in Complaint ¶ 14.

9. The Oklahoma Foundation for Medical Quality, Inc. (OFMQ) has been dismissed from this action; therefore, State Defendants deny Complaint ¶ 23.

10. Complaint ¶¶ 28, 29, 30, and 66 are statements of law to which no response is required.

11. State Defendants admit Plaintiff Milton Evans lobbied the Oklahoma Legislature but are without sufficient knowledge or information to admit or deny the remaining allegations in Complaint ¶ 35 and therefore deny the same.

12. State Defendants admit the Medicaid contract of Texoma Mental Health Services, Inc., was not renewed beyond thirty days but deny the remaining allegations in Complaint ¶ 36.

13. State Defendants admit OHCA notified Plaintiff Southeastern Oklahoma Family Services, Inc., that its Medicaid contract would be terminated pursuant to the contract's without cause termination procedures. State Defendants deny the remaining allegations in Complaint ¶ 43.

14. Defendants Fogarty, Mitchell, Fritz, Brown and Webb deny they denied reimbursement of any kind to Plaintiffs. Defendants Brickner, Rounds, Hoffman, Humble, McFall, Miller, Roggow admit that acting as the OHCA Board of Directors they do not reimburse private providers of behavioral health services at a greater rate than Community Mental Health Centers. State Defendants deny the remaining allegations in Complaint ¶ 44.

15. State Defendants admit private providers of behavioral health services are paid only for those services approved for Medicaid recipients prior to the giving of services. State Defendants deny the remaining allegations in Complaint ¶ 56.

AFFIRMATIVE DEFENSES

1. Plaintiffs fail to state a cause of action for which relief may be granted.
2. State Defendants have immunity from liability for the actions alleged.
3. The actions are barred by the statute of limitations.
4. Damages are not available from the State Defendants named in their official capacities because they are not persons.
5. Damages from the State Defendants named in their individual capacities are limited by 42 USC § 1981a.
6. The actions are barred by the doctrine of estoppel.

Respectfully Submitted,

/s/ Andrew Tevington
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Andrew Tevington, OBA #11545
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Attorney for State Defendants

CERTIFICATE OF MAILING

On this 17th day of July, 2002, the undersigned caused the above and foregoing document to be placed in the U.S. Mail, postage prepaid, and addressed to:

Steven E. Holden
Michael S. Ashworth
Stephen J. Capron
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200 Reunion Center
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Tulsa, Oklahoma 74103

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/s/ Andrew Tevington
Andrew Tevington

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ALFRED MILTON EVANS, an individual, and SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC., a corporation,

and

DOTTIE R., an individual, TOMMY W., an individual, RHONDA C., an individual, OLIVE D., as an individual and as legal guardian to ELIZABETH E., BRIAN E. and DOUGLAS E., as well as all those similarly situated,

Plaintiffs,

vs.

MIKE FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority, TERRI FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority, DR. LYNN MITCHELL, in his individual capacity, as well as in his official capacity as State Medicaid Director for the Oklahoma Health Care Authority, DANA BROWN,

Case No. CIV-01-252-W

in her individual capacity, as well as in her official capacity as Legislative Liaison from the Oklahoma Health Care Authority, T.J. BRICKNER, JR. in his official capacity as Vice-Chairman of the Oklahoma Health Care Authority, RONALD ROUNDS, O.D., in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, WAYNE HOFFMAN, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, JERRY HUMBLE, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors, CHARLES ED McFALL, in his official capacity as Chairman of the Oklahoma Health Care Authority Board of Directors, GEORGE MILLER, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors, and LYLE ROGGOW, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors,

Defendants.

ORDER

(Filed Feb. 12, 2001)

I. Introduction

Before the Court is Plaintiffs' Application for Temporary Restraining Order and Temporary Injunction filed on February 6, 2001. Defendants oppose the motion and filed a response brief on February 8, 2001. The Court held a hearing on the motion for temporary restraining order on February 8-9, 2001. All parties to the suit were represented by counsel at the hearing.

The plaintiffs in this case are of two types. It appears the primary plaintiffs ("plaintiffs") in this matter are Alfred M. Evans and Southeastern Oklahoma Family Services, Inc. ("SOFS"). SOFS is a provider of mental health care in southeastern Oklahoma. The secondary plaintiffs ("class") appear to be patients of SOFS that would be harmed if defendants' alleged conduct continues.

The defendant is, in essence, the Oklahoma Health Care Authority ("HCA"). Plaintiffs are suing certain HCA's officers (in their individual and official capacities) and the board of directors (in their official capacities only). The HCA is responsible for the disbursement of Medicaid funds to state-run, or state-contracted, Medicaid facilities.

Plaintiffs claim they have been subject to arbitrary and capricious actions by the defendants. Specifically, plaintiffs claim that due to Evans and

SOFS's open criticism of the current Medicaid system, SOFS has been subject to actions such as:

1. the use of abusive auditing tactics;
2. restriction of SOFS's cash flow trough [sic] arbitrary denials of reimbursement;
3. the exertion of improper influence over Medicaid reimbursement plans;
4. arbitrary delays in providing undisputedly appropriate reimbursements, and
5. denial of reasonable and adequate reimbursement rates.

As a result of these actions, plaintiffs assert six causes of action. Plaintiffs claim defendants' actions 1) violate their First Amendment rights, 2) violate their due process rights, 3) violate the Boren Amendment guarantees of reasonable and adequate reimbursements under the Medicaid program, 4) violate the Boren Amendment guarantees of reasonable access to and adequate quality of Medicaid services, 5) violate the Medicaid Act's guarantee of medical services that are of sufficient amount, duration, and scope, and 5) violate 42 U.S.C. § 6009 guarantees of appropriate treatment, services, and habilitation for disabled persons.

Defendants deny the allegations and submit that their actions have been neither arbitrary, nor capricious. They contend that the actions were legitimately taken to enforce state and federal regulations

and to ensure the well-being of the mentally ill population in southeastern Oklahoma.

II. Background

The dispute between the parties arises from the complex relationship between the parties to this suit. Plaintiff Alfred M. Evans previously owned Texoma Mental Health Services ("Texoma"), a Medicaid mental health provider in southeastern Oklahoma. Mr. Evans, is a vocal critic of Oklahoma's current system of Medicaid funding. He has lobbied various government officials, including the Governor and various state legislators, to provide greater funding for private medical care providers in the state. As a result of his and others' efforts, the State appropriated additional funding for state supported, privatized medical care. According to plaintiffs, due to Evans' crusade for Medicaid reform in Oklahoma, defendants terminated the State's Medicaid contract with Texoma.

Defendants deny that Texoma's contract was terminated as a result of Evans' political activities. Rather, defendants contend, Texoma's contract was cancelled as a result of substantial billing irregularities that were uncovered through the HCA auditing process.

Without Medicaid reimbursement funds, Texoma entered into bankruptcy. In an effort to continue services, Evans started SOFS, a new non-profit mental health company. In order to keep his involvement with

SOFS from the defendants, Evans is not directly affiliated with SOFS but rather works as a consultant.

SOF began operations in the summer of 2000. Within a few months of Texoma's bankruptcy filing, substantially all of Texoma's personnel and client base transferred to SOFS. SOFS offered medical services throughout southeastern Oklahoma with offices in Hugo, Durant, and Ardmore. SOFS serves approximately 740 mentally ill individuals in a 10 county area.

The HCA conducted an audit of SOFS's Hugo facility on October 19, 2000. During that audit, certain records were inspected and cataloged. While complete findings were not issued at that time, the auditors notified SOFS officials that various violations were taking place.

Evans continued his efforts on behalf of Medicaid reform by filing an Oklahoma Open Records Act request on November 22, 2000. In it, Evans sought detailed information on the RCA's spending and administrative practices. Two business days later, on November 28, 2000, SOFS's Ardmore facility was the subject of an audit conducted by the HCA. Once again complete findings were not made on site, but the auditors noted various violations of HCA policy. Plaintiffs claim, however, that the exit interview with the HCA auditors was very positive and complimentary. The auditors apparently made "commendations" and were helpful in devising solutions to the apparent

deficiencies. On December 4, 2000, the HCA sent a letter to Evans informing him that his Oklahoma Open Records Act request would be expensive, and that Evans would be responsible for bearing the cost. The letter also gave Evans an opportunity to withdraw his request. Evans declined and informed the HCA of his intention to proceed with the request on December 19, 2000.

The HCA released the full results of the Hugo audit on December 14, 2000, the results of the Ardmore audit followed on the same day Evans renewed his records act request – December 19, 2000. Both audits revealed deficiencies in SOFS's performance and the State sought recoupment of funds in both cases. In each report, SOFS was notified both of its right to appeal, the findings, and of the proper procedure for pursuing an appeal.

Having received no response to his open records request by the end of December, Evans again sought the information in early January, 2001. At that time, discussions with the HCA revealed an apparent miscommunication; Evans was informed that his renewed request had not been received but that it was now going forward. On January 8, 2001, the HCA. notified SOFS of its cancellation of SOFS's Medicaid contracts; while the letter mentioned "serious deficiencies" in SOFS's performance, the HCA chose to terminate the contract without cause. Immediately following the termination letter, the HCA notified SOFS that it was being placed on "on review" status. This "on review" status apparently requires SOFS to

submit all its billing manually rather than through the electronic system normally used.

Negotiations between the parties continued and on January 19, 2001, after a meeting with state representative Randal Erwin, the HCA chose to temporarily suspend the termination of SOFS's Medicaid contracts. Currently, the Medicaid contracts are continuing, but SOFS is required to manually submit all of its billings.

III. Legal Standards

Plaintiffs' motion for a temporary restraining order seeks to maintain what they call the "anti-status quo." In essence, plaintiffs seek to have this Court order the defendants to reinstate plaintiffs' automatic billing privileges and keep the contract termination in abeyance until after a full hearing on the merits of this case.

When the party opposing a motion for a temporary restraining order actually receives notices of the application, the procedure that is followed does not functionally differ from that on an application for a preliminary injunction. *TLX Acquisition Corp. v. Telex Corp.*, 679 F. Supp. 1022, 1028 (W.D. Okla. 1987); see also WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: Civil 2d §2951. When the opposing party has an opportunity to be heard at the TRO hearing, the court may properly treat the motion as one for a preliminary injunction. *Levas & Levas v. Village of Antioch, Illinois*, 684 F.2d 446, 448 (7th Cir.

1982). When all parties have notice and appear at a hearing, the higher showing contemplated by the TRO provisions of FED.R.CIV.P. 65(b) is not necessary. *Id.*

In order to merit a preliminary injunction, plaintiffs must establish that: (1) they have a substantial likelihood of prevailing on the merits; (2) they will suffer irreparable injury if they are denied the injunction; (3) its threatened injury outweighs the injury that the opposing party will suffer under the injunction; and (4) an injunction would not be adverse to the public interest. *Autoskill, Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1487 (10th Cir.) (citation omitted), *cert. denied,* 510 U.S. 916 (1993).

Plaintiffs must make a heightened showing because they request the Court to command defendants to alter the status quo by returning plaintiffs to an automatic billing system. When plaintiffs seek such a preliminary mandatory injunction, they must meet a higher standard than if they were simply trying to maintain the status quo. *Malkentzos v. DeBuono,* 102, F.3d 50, 54 (2nd Cir. 1996). Because of the heightened requirement for affirmative action, plaintiffs must demonstrate that the preliminary mandatory injunction weighs heavily in their favor.

IV. Analysis

Likelihood of Prevailing on the Merits

Plaintiffs bring six causes of action in the present suit. Specifically, plaintiffs assert that defendants' retributive actions 1) constitute a prior restraint on speech in violation of the First Amendment, 2) violate plaintiffs' due process rights by breeching [sic] the implied covenant of good faith in the Medicaid contracts, 3) violate the rights to reasonable and adequate reimbursement for services afforded by the Boren Amendment, 42 U.S.C. § 1396(a)(a)(13)(A), 4) violate the right of reasonable access to medical care for patients under the Boren amendment, 5) violate patients' rights to adequate amount, duration, and scope of care afforded by the Medicaid Act's implementing regulations, 42 C.F.R. § 440.230, and 6) violate patients' rights to appropriate treatment, services, and habilitation for disabilities pursuant to 42 U.S.C. § 6009. Plaintiffs bears [sic] the burden of proving they are likely to succeed on these claims.

First Amendment Claim

In the view of the Court, the plaintiffs have shown a substantial likelihood of success on the merits of their First Amendment Claim. The core of plaintiffs' claim is that defendants have retaliated against them because of Evans' lobbying and other political activities. Retaliation for the exercise of First Amendment rights is an accepted cause of action. *See Board of County Commissioners, Wabaunsee County,*

Kansas v. Umbehr, 518 U.S. 668 (1996). In the present case, the evidence presented during the hearing demonstrates an uncanny correlation, between Evans' exercise of free speech rights and administrative actions taken by the HCA.

When Evans opposed the HCA by lobbying the legislature for additional funding his predecessor company, Texoma, lost its Medicaid contract. When Evans submitted an Oklahoma Open Record Act request to the HCA, the HCA instituted an audit of SOFS's Ardmore facility two business days later. While some discrepancies were found, the overall tone or the audit was positive; Dr. Baumberger testified that the auditors were complimentary and gave numerous commendations to the SOFS staff.

To further add to the series of coincidences, the HCA contacted Evans and gave him an opportunity to withdraw his open records act request a few days after the audit. In addition, on December 19, 2000, the day Evans renewed his request for information, the HCA released the audit report that harshly criticized SOFS's Ardmore facility even though the auditors had been very complimentary during their exit interview.

The series of coincidences continued into January 2001. The HCA claims to have misplaced Evans' information request. Evans again renewed his request on January 3, 2001 and on January 8, 2001, SOFS received notice that the HCA was terminating

all of SOFS's Medicaid contracts. This letter was followed by notice that SOFS was being put on an "on review" status mandating manual billing procedures on January 10, 2001.

In an attempt to negotiate a compromise with the HCA, plaintiffs again met with HCA officials on January 19, 2001. This time, the meeting was in the presence of State Representative Randall Erwin. At this Meeting, the evidence appears to show that the HCA's legislative liaison, Dana Brown, made disparaging remarks regarding Evans and SOFS. Testimony from both Dr. Baumberger and Mr. Evans shows that HCA was aware of Evans' involvement with SOFS and Texoma. Ms. Brown's comments indicated that she believed Evans to be "playing games" with the HCA and that it would not be tolerated. Plaintiffs contend the timing correlation between Evans' political actions and HCA administrative actions shows that HCA was retaliating against Evans and SOFS. Their claim is further bolstered by the evidence showing Ms. Brown held a very negative view of Mr. Evans and the companies he was associated with.

The defendants claim the timing of these events is purely coincidental. They presented evidence to show that the audit system is semi-independent of the HCA. Jana Webb, the supervisor of the Surveillance Utilization and Review System (SURS), testified at the hearing that SURS is completely responsible for auditing Medicaid providers. She also testified that she had no knowledge of Evans'

information request and that she instituted the SOFS audits of her own accord. She further testified that she made the recommendation to terminate the SOFS contracts and to place them on an "on review" status based solely upon her audit findings.

Defendants do not deny that Ms. Webb should have been notified if Mr. Evans' information request was being properly processed. Since the information request specifically sought information from Ms. Webb's department, she should have been informed of Evans' information request. Defendants also do not deny that the complaints that supposedly caused Ms. Webb to instigate the SOFS audits were made by persons fired from SOFS. Defendants merely claim the information in the complaints was proven credible when the audits revealed missing files.

SOFS is a relatively new corporation. Plaintiffs admit that some record keeping errors have occurred as the business has begun to grow and mature. However, rather than give plaintiffs adequate opportunity to correct the faulty procedures revealed during the audits, defendants terminated the Medicaid contracts less than one month after the audit reports were complete; they did not even leave enough time for the appeals process to be completed.[1]

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[1] After discussions with plaintiffs, the defendants have placed the contract termination in abeyance pending completion of the administrative appeal process.

The Court believes the plaintiffs have shown that they are likely to succeed in showing that the defendants took certain retaliatory administrative actions in response to the exercise of First Amendment rights by Mr. Evans.

Due Process Claim

The Court believes that plaintiffs have shown a substantial likelihood of success on the merits with regard to their due process claim as well. From the discussion above, it appears that the HCA may have acted in bad faith in terminating SOFS's Medicaid contracts. Every commercial contract contains an implied covenant of good faith and fair dealing. 12A Okl.St.Ann. § 1-203. Because the plaintiffs have shown a substantial likelihood of success in showing defendants' bad faith, the Court finds there to be a substantial likelihood of success on plaintiffs' due process contract claim.

Statutory Claims

Plaintiffs assert four statutory claims based upon two statutes and one regulation. They claim rights guaranteed in the Boren Amendment, 42 U.S.C. § 1396(a)(a)(13)(A), the Medicaid Act's implementing regulations, 42 C.F.R. § 440.230, and the Medicaid Act itself, 42 U.S.C. § 6009, are all violated by defendants actions.

The Court finds that while some of plaintiffs claims in this regard may not be successful, they have shown a likelihood of success on the remainder of their claims. The Court notes that the Boren Amendment, 42 U.S.C. § 1396(a)(a)(13)(A) (1996), as relied upon by the plaintiffs was repealed in 1997 and replaced with a procedure for ensuring adequate input into the reimbursement rate determination process. 42 U.S.C. § 1396(a)(a)(13)(A) (2000).[2] The statute as cited by plaintiffs no longer guarantees a right of reasonable access to medical facilities.[3] Because their claims regarding adequate reimbursement and reasonable access to facilities are based on a partially repealed statute, the Court finds that, while plaintiffs may in fact prevail on these claims, they have not shown a substantial likelihood of success on the merits.

However, plaintiffs do make compelling arguments with respect to their other statutory claims. The rights guaranteed by 42 C.F.R. §440.230 and 42 U.S.C. § 6009[4] appear to be infringed by defendants

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[2] Plaintiffs presumably intend to pursue their claim to a "reasonable reimbursement" based upon the new language of 42 U.S.C. § 1396(a)(a)(13).

[3] Plaintiffs have notified the Court that while the language guaranteeing the right to reasonable access to medical services has been removed from 42 U.S.C. § 1396(a)(a)(13), it appears in 42 U.S.C. § 1396(a)(a)(10)(B). The Court presumes plaintiffs intend to proceed under this statute.

[4] The Court notes that 42 U.S.C. § 6009 was repealed by Act of October 30, 2000, Pub. L. No. 106-402 § 401. However, the

(Continued on following page)

actions. While there is some dispute as to the effects of terminating SOFS as a medical service provider, the Court believes defendants actions in terminating SOFS as a provider, without ensuring the availability of adequate replacement medical facilities (see irreparable harm analysis below), demonstrate a substantial likelihood of success with respect to some of plaintiffs' statutory claims.

Plaintiffs' Irreparable Injury

Plaintiffs claim a variety of irreparable harms will befall them if this Court refuses to issue a mandatory injunction. Plaintiffs claim that failure to issue an injunction will result in an unconstitutional prior restraint of free speech. They also claim that SOFS will be forced out of business, and that the patients currently served by SOFS will either go untreated or will receive inadequate care.

Harm to Evans

Prior restraints give rise to a heavy presumption of unconstitutionality. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). Plaintiffs have shown that they feel threatened by defendants' actions and that there is a substantial likelihood that their speech has been effectively chilled. Defendants simply deny any

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rights previously codified in 42 U.S.C. § 6009 are substantially reinstated in Pub. L. No. 106-402 § 109. The Court presumes the plaintiffs wish to bring their action under this section.

connection between Evans' political speech and their actions; therefore, they deny that any First Amendment right is at issue. If defendants' actions are chilling plaintiffs' speech, there is no doubt that plaintiffs will suffer irreparable harm if an injunction does not issue.

Harm to SOFS

Plaintiffs also claim that SOFS will be forced out of business should the Court decline to issue an injunction. Plaintiffs have provided evidence that, in their line of business, most organizations operate on a shoestring budget. Should their cash flow be disrupted for any length of time, they will not be able to continue operations. By placing SOFS on the "on review" manual billing system, the evidence shows that defendants have effectively slowed SOFS's cash flow to a trickle. The "on review" manual billing system requires that, for each medical procedure billed to the State, the plaintiffs must attach documentation proving that the procedure was, in fact, performed. While this system may seem benign, the evidence presented during the hearing shows that being placed on the "on review" system is a death sentence for virtually all providers placed on it. While defendants readily admit that numerous providers have been placed on "on review" status over the years, they are more reluctant to admit that no corporate medical provider placed on the list has ever

gotten off of it; they have all gone out of business.[5] The reasons that the manual system is a "death sentence" appear to be numerous. In order to even submit the billings to the state, clinicians' reports must be collected and attached to lengthy, complicated forms. Even well-trained personnel appear to have difficulty completing to [sic] forms. After they are sent to the state, the billings must be manually reviewed by SURS personnel and then approved by the HCA before being manually entered into the billing system. Even then, the computer may reject the claim for a variety of pre-determined rationale. The evidence shows that, at best, the turnaround time for a properly filed claim is two to three weeks. However, sometimes the delay may exceed a number of months. The "on review" system appears to be "an anvil that has worn out many a hammer."

Defendants claim that these harms to SOFS are not irreparable. They allege that all harms stated are merely economic and that if the plaintiffs prevail at trial, money damages will be sufficient to compensate them. However, the Court finds the precarious nature of plaintiffs' finances, coupled with the additional burden of the "on review" system clearly show that

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[5] Defendants claim that one corporate entity has survived the "on review" procedure. However, from the evidence presented, it appears this provider has not been removed from the "on review" status, but has merely survived for five months. In addition, it is unclear if this "surviving" provider serves a clientele similar to SOFS's.

SOFS will go out of business and lose personnel should injunctive relief be denied. Therefore, the Court finds that SOFS will suffer irreparable injury should the Court decline to grant injunctive relief.

Harm to Patients

While the Court believes that harm will befall both Evans and SOFS should injunctive relief be denied, failure to grant injunctive relief will cause the greatest amount of harm to the mentally ill patients served by SOFS. The evidence shows that SOFS is one of the few providers willing and able to care for the chronically ill mental patients in southeastern Oklahoma. Many of the chronic patients that SOFS serves have been turned down by other mental service providers in the region. One of the doctors employed with SOFS, Dr. Baumberger, characterized SOFS as the provider of last resort for hundreds of chronic mental patients.

In addition, the evidence presented during the hearing shows that southeastern Oklahoma has an unusually high need for mental health services. Another doctor employed with SOFS, Dr. Foster, testified that there is an unusually high incidence of inter-generational mental problems in the area. In addition, due to the poverty of the region, many patients do not have the necessary transportation to travel to medical providers. SOFS is one of the few providers that offer in-home care for a number of its patients.

Most convincingly, plaintiffs showed that there are simply not enough facilities in the region to absorb the patient load if SOFS were suddenly forced out of business. SOFS serves approximately 740 patients. Of those patients, testimony showed that roughly 80% are chronically ill and extremely difficult to place elsewhere. In addition, a significant number of patients served by SOFS are children. Testimony showed that other facilities are generally not equipped or staffed to deal with the special needs of mentally ill children. While defendants claim that roughly ten other mental facilities stand ready to accept those that [sic] displaced should SOFS close down, they did not counter plaintiffs' evidence that, at best, 20% of SOFS's patients could be transferred, leaving many children and the chronically ill to fend for themselves.

Plaintiffs also produced convincing evidence that, even if places could be found at other providers, such a sudden change would likely cause irreparable damage to many of the patient population. The testimony also showed that unless a proper transition could be made, some patients will suffer from separation anxiety or abandonment. In many cases, this anxiety would result in the need for hospitalization. An abrupt closing of SOFS would not provide patients an adequate transition period.

Defendants deny that patients will suffer any harm from the closing of SOFS. They simply point to ten different agencies in the geographic region that accept Medicaid and claim that the patients will be

cared for. They did not dispute Dr. Foster's predictions of numerous patient hospitalizations should SOFS close, nor did they dispute his claim that the chronically ill would go uncared for.

While they do not adequately refute plaintiffs' evidence showing the irreparable harm that would result from SOFS's closure, defendants claim that patients will suffer greater harm if SOFS is allowed to remain open. They point to the lack of documentation revealed by the audits and infer that many patients are receiving inadequate care at SOFS. The defendants believe that documentation is inextricably linked to the care given. However, the defendants were not able to prove that a single patient had not received adequate care at SOFS. The Court agrees with Dr. Baumberger that while proper documentation is important, the level of care provided is more important than the level of documentation recorded.

Balance of Harms

As detailed above, the plaintiffs will suffer a number of harms should this Court refuse injunctive relief. Plaintiff Evans will suffer an arguably unconstitutional prior restraint of speech, SOFS will likely be forced to cease business operations, and the mentally ill in southeastern Oklahoma will be without an invaluable resource. Many of the patients will not be accepted elsewhere and their condition will deteriorate. Clearly, the harms that will be suffered by the plaintiffs are great.

The question remaining is what harm will the defendants suffer should this Court choose to grant injunctive relief? The harm to the defendants resulting from a mandatory injunction appears to be slight. The defendants claim that they have a duty to the state to ensure that Medicaid procedures are properly documented and performed. In essence, this amounts to a duty to protect the public treasury. The Court finds however, that even if an injunction mandating plaintiffs' return to electronic billing is issued, the defendants should be adequately protected. The defendants' right to conduct audits and recoup monies would be unaffected. In addition, plaintiffs would be required to post a surety as required by FED.R.CIV.P. 65(c). As a final protection against improper billing, plaintiffs have agreed to submit progress notes to ensure the HCA receives proper documentation for claims.

Nevertheless, defendants claim that monies that might somehow be improperly paid to plaintiffs would deprive other patients in the State of proper medical care. The Court shares defendants' concern for the Medicaid recipients in Oklahoma but finds the protections against improper billing to be adequate to protect the public treasury. Therefore, the Court finds the potential harm to the plaintiffs significantly outweighs the potential harm suffered by the defendants.

Public Interest

The final factor to consider is the effect of injunctive relief on the public. Once again, the Court finds the factor weighs in favor of granting injunctive relief. The plaintiffs have provided the Court with ample evidence in the form of affidavits and testimony that the public will be better served if SOFS remains in business pending the outcome of a trial on the merits.

Plaintiffs have produced evidence to show that the demise of SOFS would cause an increased burden on law enforcement in the region. Because law enforcement is required to respond to every disturbance, even a small increase in the number of mentally unstable people in the general populace would stretch current law enforcement resources beyond their capacity.

In addition, the sudden closure of SOFS would hurt the community as a whole. As the evidence has demonstrated, many individuals currently receiving care from SOFS would suddenly be without. Because many of these individuals are dangerous to themselves and others if their conditions are not properly treated, a failure to obtain care could have significant repercussions.

Defendants counter these arguments by stating that the patients will receive better care at other facilities. Unfortunately, as discussed above, defendants are unable to show the Court that these [sic] many of these displaced patients will receive any care,

much less better care. Therefore, the Court finds that the public interest is better served by the issuance of a mandatory injunction.

V. Conclusion

As detailed above, plaintiffs have showed that each of the four injunctive factors weigh in their favor. While plaintiffs may not succeed on every claim they assert, they have shown a substantial likelihood of success on the merits for the majority of asserted claims. They have also shown that they will suffer irreparable harm should injunctive relief be denied, that the balance of harms weighs substantially in their favor, and that the public interest is best served by the granting of an injunction. In addition, the Court finds the plaintiffs have met the heightened burden required for the granting of a preliminary mandatory injunction. Therefore, for the reasons set forth more fully above, the Court:

1. GRANTS plaintiffs' motion for a preliminary mandatory injunction; and
2. ORDERS defendants to return SOFS to the automated billing procedure; and
3. ORDERS plaintiffs to timely submit to HCA all documentation that would be required under a manual billing system; and
4. ORDERS defendants to hold the termination of SOFS's Medicaid contracts in

abeyance pending an outcome on the merits of the present suit; and

5. ORDERS plaintiffs to post a bond in the amount of $40,000 pursuant to FED.R.CIV.P. 65(c).

ENTERED this 12th day of February, 2001.

/s/ Lee R. West
LEE R. WEST
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ALFRED MILTON EVANS, an individual; SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC., a corporation,

Plaintiffs-Appellees,

v.

MIKE FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority; TERRIE FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority; DANA BROWN, in her individual capacity, as well as in her official capacity as Legislative Liaison from the Oklahoma Health Care Authority,

Defendants-Appellants,

and

DR. LYNN MITCHELL, in his individual capacity, as well as in his official capacity

No. 04-6007

(W.D. Oklahoma)

(D.C. No. 01-CV-252-H)

as State Medicaid Director for the Oklahoma Health Care Authority; T.J. BRICKNER, JR., in his official capacity as Vice-Chairman for the Oklahoma Health Care Authority; RONALD ROUNDS, O.D., in his official capacity as member of the Oklahoma Health Care Authority Board of Directors; WAYNE HOFFMAN, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors; JERRY HUMBLE, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors; CHARLES ED McFALL, in his official capacity as Chairman of the Oklahoma Health Care Authority Board of Directors; GEORGE MILLER, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors; LYLE ROGGOW, in his official capacity as member of the Oklahoma Health Care Authority Board of Directors,

Defendants.

ORDER AND JUDGMENT*

(Filed Jan. 26, 2005)

Before **KELLY**, **ANDERSON**, and **O'BRIEN**, Circuit Judges.

Defendants Mike Fogarty, Terrie Fritz and Dana Brown, employees of the Oklahoma Health Care Authority ("OHCA"), seek an interlocutory appeal of the district court's order denying their request to file a third motion for summary judgment asserting that they are entitled to qualified immunity from plaintiffs' 42 U.S.C. § 1983 lawsuit. For the reasons that follow, we conclude we lack jurisdiction over this appeal and dismiss it.

Plaintiffs, Alfred Milton Evans, the Southeastern Oklahoma Family Services, Inc. ("SOFS"), providers of mental health care in southeastern Oklahoma, as well as some SOFS patients, brought this § 1983 action against defendants and others,[1] alleging, *inter alia*, that their First Amendment rights were violated

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] The remaining defendants were all connected to OHCA in various capacities.

when defendants retaliated against them for speaking publicly about various issues affecting Oklahoma's Medicaid system.

The resolution of this appeal requires a general understanding of the lengthy history of this litigation: Plaintiffs initially successfully obtained a preliminary injunction against defendants barring them from continuing to violate plaintiffs' constitutional rights. Defendants first raised the defense of qualified immunity in their answer to plaintiffs' third amended complaint. Appellants' App. at 56-63. They then filed a motion to dismiss based on qualified immunity. Appellees' App. to Mot. to Dismiss at tab 3. The district court denied defendants' motion to dismiss and defendants did not attempt to appeal.

Defendants then filed a motion for summary judgment on various grounds with no mention of a defense of qualified immunity. They subsequently withdrew the motion. Defendants thereafter filed eight further separate motions for summary judgment against plaintiffs. None of those motions raised the defense of qualified immunity either. The court denied these motions and defendants did not attempt an appeal.

The parties subsequently filed a joint pretrial report which also failed to raise a defense of qualified immunity. A five-day trial in April 2003 resulted in a jury verdict in favor of plaintiffs. Defendants did not raise the issue of qualified immunity in any of their trial or post-trial motions.

However, for reasons not relevant here, the district court later granted defendants' motion for a new trial. Prior to this second trial, defendants sought permission from the district court to file yet another motion for summary judgment seeking to raise specifically the defense of qualified immunity. The district court denied the request, stating as follows:

> To the extent defendants seek leave to assert a qualified immunity defense by summary judgment motions to be filed, their motion is DENIED. This case has already gone to trial once. The pretrial order entered in the case did not preserve or assert the defense of qualified immunity. While a second trial need not necessarily involve the same witnesses and proof, the Court concludes it is inappropriate, in the circumstances of this case, to permit defendants to raise new and different legal issues or defenses not at issue in the first trial.

Order, Appellees' App. to Mot. to Dismiss at tab 11.

Defendants seek to effect an appeal of that order denying them permission to file another motion for summary judgment asserting the defense of qualified immunity. They argue the order is tantamount to a final decision denying them the defense of qualified immunity and, as such, is appealable on an interlocutory basis under *Mitchell v. Forsyth,* 472 U.S. 511 (1985).

Meanwhile, the case has been fully tried to a conclusion for the second time, resulting again in a

jury verdict adverse to defendants. In the second trial, as both parties concede, defendants were able to raise a defense of qualified immunity. Indeed, they concede that the issue was included in the pretrial order and was the subject of extensive Fed. R. Civ. P. 50 written submissions, which apparently remain pending before the district court.[2]

Plaintiffs seek dismissal of this appeal for lack of appellate jurisdiction. We agree with plaintiffs. While the denial of qualified immunity can be an appealable collateral order, *see Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Mitchell*, 472 U.S. at 526, the district court's order in this case did not address any qualified immunity issue. It was simply a pretrial order denying defendants' request to file a motion. *See Edwards v. Cass County*, 919 F.2d 273 (5th Cir. 1990). Defendants will have a full opportunity to address any properly preserved qualified immunity issue on appeal from the adverse jury verdict reached in, and any adverse post-trial rulings with respect to, the second trial. Defendants' assertion that they are somehow prejudiced by our refusal to hear this interlocutory appeal because they will otherwise be required to post a bond in order to gain review of their qualified immunity defense is unavailing. It does not transform an otherwise unappealable

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[2] Although the defendants sought to effect this interlocutory appeal prior to the conclusion of the second trial, we permitted the trial to proceed based upon the district court's certification that the appeal was frivolous and not taken in good faith.

order into an appealable one, and it does not serve the core purpose for an interlocutory appeal set out in *Mitchell*. To the contrary, any remand for proceedings on the summary judgment motion at this late date will add both delay and expense, and, at best, probably only postpone the time when an appeal bond will have to be posted. Thus, as a practical matter, the attempted appeal is effectively moot.

Accordingly, in the peculiar circumstances of this case, we lack jurisdiction to review on an interlocutory basis the district court's order denying defendants permission to file a motion for summary judgment. Appeal DISMISSED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ALFRED MILTON EVANS, ET AL.,	)	
Plaintiffs,	)	NO. CIV-01-0252-HE (Consolidated Number)
vs.	)	
MIKE FOGARTY, ET AL.,	)	
Defendants.	)	

ORDER

Defendants Fogarty, Fritz and Brown have filed their combined motions seeking leave to file summary judgment motions based on qualified immunity and other relief. Plaintiffs have responded in opposition.

To the extent defendants seek leave to assert a qualified immunity defense by summary judgment motions to be filed, their motion is **DENIED**. This case has already gone to trial once. The pretrial order entered in the case did not preserve or assert the defense of qualified immunity. While a second trial need not necessarily involve the same witnesses and proof, the Court concludes it is inappropriate, in the circumstances of this case, to permit defendants to raise new and different legal issues or defenses not at issue in the first trial.

Defendants' motions, insofar as they seek leave to file supplemental motions in limine, are **GRANTED**. Deadlines for the submission of such motions, by any

party, will be determined later. The Court will determine the need for a scheduling conference and/or the schedule to be observed in connection with the retrial after the filing of the proposed revised pretrial report and briefs referenced in the Court's October 16, 2003, order.[1]

IT IS SO ORDERED.

Dated this 3rd day of December, 2003.

/s/ Joe Heaton
JOE HEATON
UNITED STATES DISTRICT JUDGE

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[1] *The parties should address the matter of any supplemental motions in limine in their discussions leading to submission of the revised pretrial report and, if agreement can be reached, reflect those agreements in the proposed pretrial report.*

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ALFRED MILTON EVANS, et al.,	)	
Plaintiffs,	)	Case No. CIV-01-252-HE
vs.	)	(Consolidated Number)
MIKE FOGARTY, et al.,	)	
Defendants.	)	

JOINT AND COMBINED MOTIONS BY DEFENDANTS FOGARTY, FRITZ AND BROWN FOR LEAVE TO FILE MOTIONS FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY AND MOTIONS IN LIMINE AND TO SET SCHEDULING CONFERENCE AND SUPPORTING BRIEF

(Filed Nov. 12, 2003)

Defendants Mike Fogarty, Terri Fritz and Dana Brown move the Court for an Order allowing leave (1) to file motions for summary judgment based on qualified immunity (2) to file motions in limine and (3) to set a scheduling conference. In support thereof, Defendants state:

Introduction

The Court has "broad discretion in its control and management of [a second] trial." *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1450 (10th Cir. 1993). In streamlining the conduct of the second trial, the

Court retains "broad latitude and may with proper notice allow additional witnesses and relevant proof." *Id.* "Technical rulings should never preclude . . . material proofs; [instead] common sense should control." *Id.* Moreover, the Court should be governed by its need for judicial management and the requirements of basic fairness to the parties in the new trial. *Id.*

For the reasons stated herein, Defendants should be allowed to file motions for summary judgment based on qualified immunity. They should also be allowed to file motions in limine. Additionally, a scheduling conference to discuss schedules of the court and the various counsel involved and to determine all necessary deadlines would be appropriate.

Defendants Should Be Given Leave To File Motions For Summary Judgment On Qualified Immunity.

Defendants should be allowed to file motions for summary judgment that would argue that these defendants are immune from suit under the doctrine of qualified immunity. Each of these defendants asserted qualified immunity in their answer to the Third Amended Complaint and in motions to dismiss. However, for reasons unknown to defendants' current counsel, the issue was omitted from the motions for summary judgment previously filed on defendants' behalf and from the pretrial order.

To benefit from qualified immunity, defendants must, of course raise the defense. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). There are, however, several ways to raise the defense. Defendants may raise qualified immunity in their answer, or in a motion to dismiss or a motion for summary judgment. *Quezada v. County or* [sic] *Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991), quoting *Pueblo Neighborhood Health Ctrs. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). "Defendants who are unsuccessful in having a lawsuit dismissed on qualified immunity grounds before trial may reassert the defense at trial or after trial." *Quezada, supra*; *see also Mick v. Brewer*, 76 F.3d 1127 (10th Cir. 1996) (same); *Dixon v. Richer*, 922 F.2d 1456, 1463 (10th Cir.1991) (same).

Of course, a defendant has the initial burden of raising qualified immunity. However, once qualified immunity is raised, the burden shifts to the plaintiff to show that the particular defendant's conduct violated the law and that the relevant law was clearly established. *The Gehl Group v. Koby*, 63 F.3d 1528 (10th Cir. 1995); *Adkins v. Rodriguez*, 59 F.3d 1034 (10th Cir. 1995); *Thompson v. City of Lawrence*, 58 F.3d 1511 (10th Cir. 1995); *Romero v. Board of Cty. Comm'rs. of Cty. of Lake*, 60 F.3d 702 (10th Cir. 1995).

Under qualified immunity, government officials are not subject to damages liability for the performance of their discretionary functions when the law was not clearly established. *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). A plaintiff initially bears a heavy two part burden once a defendant pleads qualified

immunity. A "plaintiff must show (1) 'that the defendant's actions violated a constitutional or statutory right,' and (2) that the right 'allegedly violated [was] clearly established at the time of the conduct at issue.'" *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir.1995). *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996). A plaintiff must then "articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity." *Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir.1995). Unless the plaintiff carries its twofold burden, the defendant prevails. *Pueblo Neighborhood Health Ctrs.*, 847 F.2d at 646.

Qualified immunity is an extremely important right of a public official. It is an entitlement not to stand trial or face the other burdens of litigation. *Verdecia v. Adams*, 327 F.3d 1171, 1174 (10th Cir. 2003); *Roska v. Peterson*, 304 F.3d 982, 989 (10th Cir. 2002). The doctrine of qualified immunity is a recognition of the fact that "even where personal liability does not ultimately materialize, the mere 'specter of liability' may inhibit public officials in the discharge of their duties." *Atwater v. City of Lugo Vista*, 532 U.S. 318, 351 n.22 (2001). The purpose of qualified immunity is to allow officials to take action "'with independence and without fear of consequences.'" *Schwenk v. Hartford*, 204 F.3d 1187, 1198 (9th Cir. 2000). A defendant who has lost his right not to stand trial can reassert his qualified immunity claims at and after trial when the factual issues have been

resolved. *Gossett v. State ex rel. Board of Regents*, 245 F.3d 1172, 1181 n.5 (10th Cir. 2001).

Given the important public policy embodied in the doctrine of qualified immunity, and given the judicial presumption that such immunity protects public officials from suit, defendants request that they be afforded the opportunity to demonstrate to this Court that they are immune from suit.

Defendants Should Be Permitted To File Motions In Limine.

Defendants also request permission to file motions in limine that would seek the exclusion of irrelevant, prejudicial, cumulative and unreliable testimony, exhibits and arguments that were presented by the plaintiffs in the first trial of this matter.

Based on their review of the trial transcripts, defendants believe that a considerable amount of trial time was devoted to matters which court orders in limine would properly restrict. For example, it would plainly be improper at a second trial to refer either to Judge West's order at the preliminary injunction hearing or to refer to the results of the first trial. Moreover, given the disposition of other aspects of this case, such as the dismissal of other defendants, reference to matters that were relevant to those claims should be excluded. Without arguing the merits of such potential motions, Defendants believe the second trial will be both fairer and shorter if the court has an opportunity to consider certain motions

in limine. *See* Fed. R. Evid. 103(c) (in jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury).

Motion to Set Scheduling Conference.

Defendants request that the Court set a scheduling/status conference, to discuss a schedule regarding the above-requested motions, the date of the new trial and, if appropriate, other matters.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing document was mailed this 12 day of November, 2003, to:

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/s/ Russell Cook

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA**

(1) ALFRED MILTON EVANS, an individual, and (2) SOUTHEASTERN OKLAHOMA FAMILY SERVICES. INC., a corporation,

and,

(3) DOTTIE R., an individual, (4) TOMMY W., an individual, (5) RHONDA C., an individual, (6) OLIVE D, as an individual and as legal guardian to (7) ELIZABETH E., (8) BRIAN E., and (9) DOUGLAS E., as well as all those similarly situated,

Plaintiffs,

vs.

(1) MIKE FOGARTY, in his individual capacity, as well as in his official capacity as Chief Executive Officer for the Oklahoma Health Care Authority, (2) TERRI FRITZ, in her individual capacity, as well as in her official capacity as Director of Behavioral Health for the Oklahoma Health Care Authority, (3) DR. LYNN MITCHELL,

Case No. CIV-01-252-W

in her individual capacity, as well as in her official capacity as State Medicaid Director for the Oklahoma Health Care Authority, (4) DANA BROWN, in her individual capacity, as well as in her official capacity as Legislative Liaison from the Oklahoma Health Care Authority, (5) T.J. Brickner Jr., in his official capacity as Vice-Chairman of the Oklahoma Health Care Authority, (6) RONALD ROUNDS, O.D, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (7) WAYNE HOFFMAN, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (8) JERRY HUMBLE, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, (9) CHARLES ED McFALL, in his official capacity as Chairman of the Oklahoma Health Care Authority Board of Directors, (10) GEORGE MILLER, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors, and (11) LYLE

ROGGOW, in his official capacity as a member of the Oklahoma Health Care Authority Board of Directors,

Defendants.

ANSWER

(Filed Aug. 23, 2001)

1. Defendants Mike Fogarty, in his official and individual capacities; Terri Fritz, in her official and individual capacities; Dr. Lynn Mitchell, in her official and individual capacities; and Dana Brown, in her official and individual capacities; T.J. Brickner, Jr., in his official capacity; Ronald Rounds, O.D., in his official capacity; Wayne Hoffman, in his official capacity; Jerry Humble, in his official capacity; Charles Ed McFall, in his official capacity; George Miller, in his official capacity; and Lyle Roggow, in his official capacity ("Defendants" hereafter) deny each and every allegation in Plaintiffs' First Amended Complaint except as admitted herein.

2. Defendants note that the Court has dismissed all actions seeking monetary damages against Official Capacity Defendants, making unnecessary response to allegations about Defendants in their official capacities related solely to monetary damages.

3. Defendants note that the Court has completely dismissed Counts II, III, VI, VII, and VIII of the Amended Complaint ("Complaint" hereafter),

making unnecessary response to allegations in those counts.

4. Defendants note that the Court has dismissed Count V insofar as it alleges a violation of 42 U.S.C. § 1396a(a)(13), making unnecessary response to allegations reliant on such statute in that count.

5. Defendants admit Plaintiffs brought this action pursuant to 42 U.S.C. § 1983. Defendants deny that section creates any rights, and Defendants deny the remaining allegations in Complaint ¶ 1.

6. Complaint ¶¶ 4, 5, 8 through 17, 30, 32, 35 through 42, 57, 64 through 75, and 85 through 103 require no response.

7. Defendants are without knowledge or information sufficient to admit or deny the responsibilities of Alfred Milton Evans ("Evans" hereafter) for Southeastern Oklahoma Family Services ("SOFS" hereafter) and therefore deny allegations about such. On information and belief, Defendants admit the remaining allegations in Complaint ¶ 6.

8. Defendants admit Complaint ¶¶ 7, 18 through 20, 23 through 29, 31, 50

9. Defendants deny Brown is a "quasi-lobbyist" but admit the remaining allegations in Complaint ¶ 21.

10. Defendants admit Fogarty, Fritz, Mitchell and Brown acted within the scope of their employment. The first sentence of Complaint ¶ 22 requires no response. Defendants deny the remaining allegations in Complaint ¶ 22.

11. Defendants admit behavioral health services provided by entities such as Texoma Mental Health Services, Inc., ("Texoma" hereafter) and SOFS must be pre-authorized and that such pre-authorization is performed by the Oklahoma Foundation for Medical Quality. Defendants deny the remaining allegations in Complaint ¶ 33.

12. Defendants admit Community Mental Health Centers conduct their own pre-authorization reviews pursuant to Oklahoma Health Care Authority ("OHCA" hereafter) requirements, subject to OHCA review and audit. Defendants deny the remaining allegations in Complaint ¶ 34.

13. Defendants are without knowledge or information sufficient to admit or deny when Evans formed Texoma and therefore deny allegations related to such but admit the remaining allegations in Complaint ¶ 43.

14. Defendants are without knowledge or information sufficient to admit or deny Complaint ¶¶ 46, 47, and therefore deny the same.

15. Defendants admit OHCA did not renew Texoma's Medicaid provider agreement and chose to do so without stating a cause. Defendants admit Texoma's remaining billing was required to be performed manually. Defendants admit many providers use electronic claims filing. Defendants deny the remaining allegations in Complaint ¶ 48.

16. Defendants are without knowledge or information sufficient to admit or deny that Evans hid his alleged ownership of SOFS and therefore deny the same. Defendants admit that when Evans filed this action they became aware of Evans's interest. Defendants deny the remaining allegations in Complaint ¶ 51.

17. Defendants admit Evans made a request for documents. Defendants admit OHCA audited SOFS. Defendants deny any connection between the request and the audit. Defendants deny the remaining allegations in Complaint ¶ 52.

18. Defendants deny "supervisor audits" occurred. Defendants admit the remaining allegations in Complaint ¶ 54.

19. Defendants admit OHCA served SOFS notice of contract termination as provided by the contract between them. Defendants deny any connection between Evans's request for documents and the termination notice. Defendants deny the remaining allegations in Complaint ¶ 55.

20. Defendants are without knowledge or information sufficient to admit or deny the subject of Evans's or SOFS's speech, if any, as alleged in Complaint ¶ 61 and therefore deny the same. Defendants deny the remaining allegations in Complaint ¶ 61.

AFFIRMATIVE DEFENSE

Defendants are immune from suit and liability under the doctrine of qualified immunity.

Respectfully submitted,

/s/ Andrew Tevington
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Attorney for Defendants

CERTIFICATE OF MAILING

On this 23rd day of August, 2001, the undersigned caused the above and foregoing document to be placed in the U.S. Mail, postage prepaid, and addressed to:

Steven A. Novick
1717 S. Cheyenne Avenue
Tulsa, Oklahoma 74119

Steven E. Holden
Michael S. Ashworth
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/s/ Andrew Tevington
Andrew Tevington